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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

KEITH CREWS

**PETITION FOR A WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS**

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

RICHARD A. ALLEN
Assistant to the Solicitor General

JEROME M. FEIT
FRANK J. MARINE
Attorneys
Department of Justice
Washington, D.C. 20530

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App. A, *infra*) is not yet reported. The earlier panel opinion (App. C, *infra*) is reported at 369 A.2d 1063.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on June 14, 1978. The time for filing a petition for a writ of certiorari was extended

to and including November 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the reliable in-court identification testimony by the victim of a crime, who immediately reported the crime to the police, should have been suppressed as the fruit of a later unlawful detention of respondent that produced the initial identification of him as the offender.

STATEMENT

Respondent was indicted and tried before a jury for three robberies of different women in a restroom near the Washington Monument, in violation of D.C. Code 22-2901 and 22-3202 (1973). The jury convicted him of the robbery of Carol Owens and acquitted him of the other two robberies. He was sentenced to four years' probation under the Youth Corrections Act. After a divided panel of the District of Columbia Court of Appeals affirmed (App. C, *infra*, 64a; 369 A.2d 1063, 1065), the court considered the case en banc and reversed, two judges dissenting (App. A, *infra*).

Before trial, respondent moved to suppress all evidence showing his identification by the three victims as the robber. The evidence adduced at the suppression hearing established that on the morning of January 3, 1974, while Owens was in one of the stalls of the restroom, a man reached over the top of the partition, pointed a gun at her, and demanded \$10,

which she gave him (Tr. 4-5).¹ When the assailant demanded more money, Owens told him she did not have any more. The assailant then forced entry into the stall and made sexual advances (Tr. 5-6, 16). Owens pleaded with him to leave, which he eventually did after warning her not to come out for 20 minutes, or he would return and shoot her (Tr. 6).

The restrooms were well lit by fluorescent lighting, and Owens testified she got a good look at her assailant for at least two and a half to three minutes (Tr. 7, 17). Owens described her assailant as dark complexioned, 16-18 years old, with smooth skin, and about 5'5" to 5'8" tall (Tr. 7). Twenty minutes after the robbery, she reported it to the police and gave them a description of the assailant (Tr. 8, 48-49).²

Three days later, in the mid-afternoon of January 6, 1974, a young man assaulted and robbed two other women, Sandra Denner and Ann Lawson, in a similar fashion in the same restroom. They also reported the incident to the police and provided a description matching that given of the January 3 robber (Tr. 50; App. A, *infra*, 3a).

Around noon on January 9, 1974, two Park Police officers saw respondent near the concession stand at the Monument. The officers approached him, asked him his name and age, and told him that he matched the

¹ "Tr." refers to the one volume transcript containing both the pretrial suppression hearing and the trial.

² On the day of the robbery, police showed Owens about 100 photographs of possible suspects, but she identified none as her assailant (Tr. 8-9).

description of a suspect sought in connection with robberies at the Monument (Tr. 51-52). Respondent gave the officers his name and said his age was 16 (Tr. 52, 63). When asked why he was not in school, respondent replied that "he walked away from school" (Tr. 52). Respondent then left and went into the men's restroom. While he was there, the officers spoke to a tour guide who had reported having seen a young man "standing around" in the Monument area on the day of the January 3rd robbery (Tr. 51, 123-125). When respondent came out of the men's room, the tour guide told the officers that he thought that respondent was the person he had seen on January 3 (Tr. 51). The officers then approached respondent again and detained him. Detective Ore, who was investigating the robberies, was immediately summoned (Tr. 52-53). He tried to take several Polaroid photographs of respondent at the scene, but it was raining and the photographs did not develop properly (Tr. 52-53, 59-60). Accordingly, the officers took respondent to Park Police headquarters, where they photographed him, telephoned his school, and released him within an hour (Tr. 60-61).³

On January 10, 1974, the officers showed a photographic array, including a photograph of respondent, to Owens, who selected respondent's photograph as that of the person who had robbed her (Tr. 8-9). On

³ The officer took the photographs both pursuant to routine police procedures relating to possible truants (Tr. 52-54, 63-65; see D.C. Code 31-201 (1973)) and to show them to the robbery victims (Tr. 59).

January 13, Lawson also selected respondent's photograph from an array (Tr. 28-29). Respondent was again taken into custody, and on January 16 a Superior Court judge ordered him to appear at a lineup (App. A, *infra*, 5a). At the lineup, Owens and Lawson positively identified respondent as their assailant (Tr. 10, 29). Denner did not review any photographic array or attend the lineup (Tr. 39-40, 42).

At the conclusion of the suppression hearing, the trial court ruled that the detention of respondent at Park Police headquarters constituted an arrest and was improper because it was not supported by probable cause.⁴ It further ruled that the evidence of the photographic and of the lineup identifications were fruits of this illegal arrest and could not be introduced at trial. Finding, however, that the victims' identification of respondent would be based on observations made at the time of the crime and would be independent of the photograph and lineup iden-

⁴ We believe that the facts known to the officers at the time of their initial encounter with respondent and his tentative identification by the tour guide were sufficient to establish a reasonable suspicion that he was involved in criminal activities and to justify a brief detention for inquiry and for the purpose of taking respondent's photograph. While we entirely disagree with the court of appeals' characterization of petitioner's detention at Park Police headquarters as a "flagrant" violation of his Fourth Amendment rights (App. A, *infra*, 44a), we do not here challenge the ruling of the courts below that the nature and extent of the detention exceeded permissible bounds.

tifications, the court allowed the victims to make in-court identifications at trial (Tr. 95, 96, 99).

At the trial, Owens testified that there was absolutely no doubt in her mind that respondent was her assailant. She stated that the restroom was well lit and that at one point during the incident respondent sat on her lap and was only a few inches from her (Tr. 116; see generally Tr. 107-111). Lawson also positively identified respondent as the person who robbed her and Denner (Tr. 148). Denner was less sure of her identification, but selected respondent as the person in the courtroom most closely resembling her assailant (Tr. 135-136). Respondent denied committing the robberies on either January 3 or January 6 (Tr. 172-179) and presented a witness who testified that respondent went to a movie with him on January 6 (Tr. 153). The jury convicted respondent of the January 3 robbery and acquitted him of the robberies on January 6 (Tr. 239-240).

2. A panel of the District of Columbia Court of Appeals affirmed (App. C, *infra*, 63a-87a). The panel held that Owens' in-court identification testimony was not a fruit of the January 6 arrest of respondent within the meaning of the "fruit of the poisonous tree" doctrine, but rather was a product of Owens' independent recollection of the crime (*id.* at 69a-73a). Alternatively, the panel held that even if Owens' testimony could be regarded as causally related to respondent's arrest, the policies of the exclusionary rule did not require suppression. The court noted that "[i]n the final analysis, what [respondent]

seeks is no less than an immunity from any prosecution"—a result that would impose a social cost outweighing "whatever incremental deterrence arguably might be provided by barring the victims' in-court testimony, in addition to the photographic and lineup identifications which were excluded by the trial court * * *" (*id.* at 80a-81a).

The court of appeals en banc reversed, two judges dissenting (App. A, *infra*, 1a-60a). The court held that the victim's in-court identification should have been suppressed as the fruit of the January 9 detention, notwithstanding that the identification was reliable and based on the witness's independent recollection of the crime. The court reasoned that the testimony was the fruit of the detention because the photograph then taken led to the identification of respondent as the assailant, which led to his rearrest, which led ultimately to his trial in which the testimony was given (*id.* at 20a-21a).⁵ The court rejected the gov-

⁵ Thus the court stated:

The causal chain posited by appellant runs as follows: the unlawful arrest produced photographs which were shown to the complaining witnesses who, as a result, identified appellant; this resulted in his reaprehension, which yielded a court-ordered lineup identification and, eventually, in-court identification testimony during prosecution of the case. Thus, appellant says, the courtroom identification testimony was "actually discovered by" (*i.e.*, made available to the government through) "a process initiated by the unlawful act." *United States v. Paroutian*, 299 F.2d 486, 489 (2d Cir. 1962).

* * * * *

Appellant Crews clearly demonstrated a causal connection

ernment's argument that respondent's identity would inevitably have been discovered through routine investigation, declining to adopt the inevitable discovery doctrine in its jurisdiction (*id.* at 28a-29a). The court also rejected the contention that the victim's testimony was sufficiently attenuated from the illegality attendant upon the brief arrest on January 9, distinguishing this Court's decision in *United States v. Ceccolini*, 435 U.S. 268 (1978), on the grounds that the time between the arrest and the testimony (three and a half months) was "quite a brief period" (*id.* at 38a), that there were no "significant" intervening events (*id.* at 39a-43a), that the police misconduct here was "flagrant" and "purposeful" (*id.* at 44a), and that Owens' free will in testifying did not "represent an attenuating, intervening force" (*id.* at 52a n.37).⁶

Judges Nebeker and Harris dissented. App. A, *infra*, 55a-60a. In their view, Owens' in-court identification testimony could not reasonably be viewed as a fruit of respondent's detention on January 9,

between the unlawful arrest and the in-court identification in this case.

⁶ The court also rejected the argument that suppression of Owens' testimony would be contrary to the principles of *Frisbie v. Collins*, 342 U.S. 519 (1952), and *Ker v. Illinois*, 119 U.S. 436 (1886), which held that an unlawful arrest does not impair the court's jurisdiction to try the defendant. Although the court expressed doubts about the continuing validity of *Frisbie* and *Ker* (App. A, *infra*, 8a; but see *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975)), it held that those decisions were in any event inapposite because in the instant case the court was only suppressing evidence and was not dismissing the indictment (*id.* at 15a & n.7).

and the majority's decision had the consequence of "permanently silenc[ing] the victim of a crime whose ability to testify was unrelated in any way to the unconstitutional seizure of [respondent]" (*id.* at 60a), a result they deemed incompatible with *Ceccolini*. Both dissenters expressed the hope that this Court would review the decision and "reject the majority's manifestly unwarranted extension of the exclusionary rule" (*ibid.*).

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question under the Fourth Amendment: whether the in-court identification testimony of victims of a crime, whose identity and knowledge of the crime are known to the police from the outset, should be suppressed as the fruit of a subsequent unlawful arrest of the defendant that leads police to conclude that the defendant is the criminal and thus to his prosecution. Although this Court has not considered that precise question, the decision below conflicts with decisions of most of the circuits and with principles established by this Court in related contexts. Decisions of several circuits, however, have applied the rationale of the decision below to suppress the testimony of victims or other witnesses already known to the police, and this Court's review is needed to resolve the conflict on this important question.

1. The question is important and recurring. The court of appeals held that the victim's identification

testimony was the tainted fruit of respondent's arrest on January 9 because it was as a result of that arrest that respondent was positively identified by his victim, reapprehended, and brought to the trial in which the testimony was given (see page 7, *supra*, & note 5). If the court of appeals' analysis is correct, it would have substantial and far reaching implications. It would mean that the victims of a crime, who have promptly reported it to the police, would be forever barred from testifying about the crime if, at some point in the ensuing investigation, the defendant is unlawfully arrested and the arrest materially contributes to the police's identification of him as the offender. The effective consequence of that analysis (if not the logically necessary consequence) would be permanently to immunize most defendants in such circumstances from prosecution.

The showing of arrested suspects in a lineup or of their photographs in an array to victims or other witnesses is a common and appropriate police procedure. Since there is the possibility in every case that a court may later find the arrest to have been for some reason unlawful, the determination that in those circumstances the exclusionary rule requires suppression of not only the pre-trial identifications but also the witnesses' independent and reliable recollection of the events and personae involved in the crime is one that merits this Court's review.

2. This Court has never endorsed the suppression of the reliable trial testimony of the victims' of a crime, and most of the courts of appeals

have refused to impose such an extreme cost upon the trial of criminal cases. Thus in *Payne v. United States*, 294 F.2d 723, 727 (D.C. Cir. 1961), which the court below declined to follow (App. A, *infra*, 13a, n.6), the court rejected a similar challenge to the in-court identification testimony of the complaining witness, stating:

The consequence of accepting appellant's contention in the present situation would be that [the witness] would be forever precluded from testifying against [the defendant] in court, merely because he had complied with the request of the police that he come to police headquarters and had there identified [the defendant] as the robber. Such a result is unthinkable. The suppression of the testimony of the complaining witness is not the right way to control the conduct of the police, or to advance the administration of justice. The rights of the accused in a case like the present are adequately protected when the complaining witness takes the stand in open court, for examination and cross-examination. *Cf. Frisbie v. Collins*, 1952, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541.

See also *United States v. Young*, 512 F.2d 321, 323 (4th Cir. 1975), cert. denied, 424 U.S. 956 (1976); *Carson v. United States*, 332 F.2d 784 (5th Cir. 1964); *United States v. Hoffman*, 385 F.2d 501, 504-505 (7th Cir. 1967), cert. denied, 390 U.S. 1031 (1968); *Golliher v. United States*, 362 F.2d 594, 602 (8th Cir. 1966); *Jacobson v. United States*, 356 F.2d 685, 688 (8th Cir. 1966); *Edwards v. United States*, 330 F.2d 849, 851 (D.C. Cir. 1964).

On the other hand, decisions of the Ninth and Second Circuits have employed a rationale similar to that of the decision below to suppress the testimony of victims or witnesses who were known to the police prior to the defendant's unlawful arrest. *United States v. Barragan-Martinez*, 504 F.2d 1155 (9th Cir. 1974); *United States v. Edmons*, 432 F.2d 577 (2d Cir. 1970).⁷

3. Although this Court has not yet addressed the precise question presented here, several principles and lines of analysis established in related decisions support the view of the majority of the courts of appeals that the testimony of the victims of a crime should not be suppressed in these circumstances.

a. First, we submit that the court of appeals erred in concluding, as a threshold matter, that Owens' in-court identification testimony was a "fruit" of respondent's improper detention on January 9 for

⁷ In *United States v. Barragan-Martinez*, *supra*, the court held that the in-court identification testimony of witnesses who were present when the defendant's car was unlawfully stopped and who identified the defendant at the scene of the arrest should have been suppressed as the fruit of the arrest. In *United States v. Edmons*, *supra*, the court suppressed the in-court identification testimony of victims of a crime on the ground that it was the fruit of arrests of the defendant and others that were made in "bad faith." 432 F.2d at 583-584. In a later case, however, the Second Circuit has permitted the in-court testimony of witnesses to a crime who had identified the defendants after their unlawful arrest on the ground that the unlawful arrest was made in "good faith." *United States ex rel. Pella v. Reid*, 527 F.2d 380, 383 (2d Cir. 1975).

purposes of Fourth Amendment exclusionary rule analysis. The evidence at issue—Owens' knowledge of the appearance of her assailant—was not something the police learned about as a result of having arrested respondent on January 9. The police already knew that Owens was the victim of the crime and knew that she would probably be able to recognize and identify her assailant. Thus, her trial testimony was not a "fruit" of the arrest as the concept of the "fruit of the poisonous tree" has been understood and applied in this Court's decisions—that is, where some unlawful conduct has led the police to acquire useful evidence, or, as in *United States v. Ceccolini*, *supra*, to discover the identity of a witness whom they had not previously known to be knowledgeable about the crime. Rather, respondent's arrest on January 9 was simply an event that allowed the government to utilize the evidence it already possessed—a catalyst, perhaps, but not a fruit-generating seed.

We do not deny that the evidence already possessed by the police—knowledge that Owens could identify her assailant if she saw him again—could acquire prosecutive utility only if Owens was in fact confronted with respondent or shown a photograph of him. We also acknowledge that the potential utility of her knowledge was realized in this case when she was shown the photograph taken during the period of improper detention. But we emphatically contest the conclusion that evidence already in the possession of the police can be retroactively disqualified by sub-

sequent Fourth Amendment violations.* Our contention that the court of appeals fundamentally misunderstood the kind of nexus that is required between a Fourth Amendment violation and suppressible evidence is demonstrated by reference to this Court's disposition of several significantly analogous lines of cases.

For example, in *Frisbie v. Collins*, 342 U.S. 519 (1952), the Court unanimously reaffirmed the principle established in *Ker v. Illinois*, 119 U.S. 436 (1886), that the fact that a defendant has been produced for trial by virtue of an unlawful arrest does not prevent the prosecution from going forward, even though it obviously would not have proceeded but for the illegal arrest. See also *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975). The potential value of the evidence possessed

* Although the Fourth Amendment violation here was far less egregious, the situation is parallel to that before this Court in *Davis v. Mississippi*, 394 U.S. 721 (1969), where the Court concluded that fingerprints obtained during an illegal roundup of at least 24 Negro youths for questioning and fingerprinting had to be suppressed as a tainted fruit (analogous to the uncontested suppression in this case of the identification of respondent from the photo array). There is no suggestion in *Davis* that anything should be suppressed other than the fingerprints, and Mr. Justice Stewart's dissent makes the point, not controverted by the majority, that other fingerprints of the defendant could be utilized at a retrial (394 U.S. at 730). If the court of appeals is correct in this case, however, it would appear to follow not only that no other fingerprints could have been used against Davis, but that the evidence of the rape victim herself would have been subject to exclusion because of the role the illegally procured fingerprints played in identifying Davis as the culprit.

by the prosecutors of Ker and Collins, including any testimony by victims or eyewitnesses, was realized only by virtue of the violations of those defendants' Fourth Amendment rights, yet the Court in each case plainly was of the view that this did not foreclose use of such evidence at trial.

In *Johnson v. Louisiana*, 406 U.S. 356 (1972), the Court was presented with the contention that lineup identifications of the defendant should have been suppressed because he had been illegally arrested at night without a warrant. Had he not been so arrested, Johnson argued, he would not have been available to be placed in a lineup. This line of argument, similar to the analysis of the court of appeals in the instant case linking respondent's illegal detention to Owens' in-court testimony, was rejected by the Court, which held that the commitment of Johnson by a magistrate, intervening between the arguably illegal arrest and the lineup, made it "clear that no evidence that might properly be characterized as the fruit of an illegal entry and arrest was used against him at trial" (406 U.S. at 365).

The principle that irregularities in procuring the initial identification of a suspect as the culprit will not retroactively invalidate independent eyewitness and victim identification testimony is also reflected in the line of cases dealing with improper pretrial identification procedures. This Court has established that evidence of pretrial identifications must be suppressed at trial if the procedures employed in securing the identification were unduly suggestive or if, sub-

sequent to attachment of a right to counsel, the defendant was deprived of the assistance of counsel during a lineup. Nevertheless, the Court has permitted the victim or witness to make an in-court identification if that testimony is, as here, based upon an independent recollection untainted by the improper pretrial identification procedures. See, *e.g.*, *United States v. Wade*, 388 U.S. 218, 239-241 (1967); *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972). Independent in-court identifications are allowed even though it could be said in those cases, as here, that the pre-trial identification may have played a critical role in causing the defendant to be brought to trial.

We recognize that it is possible to point to distinctions between the foregoing cases and the circumstances presented by the instant case.⁹ Nevertheless, we submit that those cases all look in a direction, inconsistent with the conclusion of the court of ap-

⁹ For example, the *Wade* line of cases, involving pre-trial identifications, were concerned primarily with the unreliability of suggestive or uncounselled identifications, and not with Fourth Amendment violations or their fruits, and they were distinguished by the court below on that basis (App. A, *infra*, 21a). Nevertheless, the suppression remedy required by those cases was designed in part to deter improper identification procedures (see, *e.g.*, *Mason v. Brathwaite*, *supra*, 432 U.S. at 112), and the suppression of the fruits of such procedures could be said to be a necessary corollary of that deterrent purpose. But this Court has not regarded independently based in-court identifications as the fruits of earlier improper pre-trial identifications and thus has rejected the theory of causation employed by the court below.

peals, that the independent in-court testimony by Owens that respondent was her assailant should not be held to be a fruit of his improper detention.

b. Even if it were conceptually sound to regard Owens' testimony as the fruit of respondent's improper detention on January 9, there remain important questions about the propriety, as a matter of exclusionary rule policy, of the suppression of the testimony of the victim of a crime, as well as about the correctness of the application of attenuation principles to the "fruits" analysis in circumstances like these. We believe that it is rarely, if ever, justifiable to exclude the testimony of a victim of a crime, particularly a crime of violence, where such testimony is based upon the victim's independent recollection of the events. We further submit that proper application of attenuation principles supports the admissibility of such evidence. Since the situation presented by this case is by its nature common and recurring, and since this Court's decision in *United States v. Ceccolini*, *supra*, does not appear to have settled the question for this class of cases, review of these matters by this Court now appears appropriate.

In *Ceccolini* this Court, specifically in the context of live-witness testimony, reaffirmed the principle established in earlier cases that whether evidence that is causally linked to some police misconduct should be suppressed depends on a consideration of a number of factors. These factors include the "temporal proximity" between the misconduct and the discovery of the evidence, the presence of intervening circum-

stances such as the free will of the witness or the declarant, "and, particularly, the purpose and flagrancy of the official misconduct." 435 U.S. at 274-280; see also *Brown v. Illinois*, 422 U.S. 590, 603-604 (1975); *Wong Sun v. United States*, 371 U.S. 471, 481-488 (1963).

The Court in *Ceccolini* also emphasized that the deterrent purposes of the exclusionary rule and the social costs of exclusion are relevant considerations, and that in view of those considerations "the exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object." 435 U.S. at 280. Plainly, this reluctance should be magnified when the live witness is the victim of the crime and when the police already knew of the existence and of the testimonial potential of the witness prior to any constitutional violation.

The considerations identified in *Ceccolini* as bearing upon the attenuation analysis in such cases generally support our submission that the court of appeals erred in this case. The factor of temporal proximity is difficult to apply in the circumstances of this case, since the police knew of the evidence at issue prior to the detention of respondent. And while the court of appeals stated a contrary conclusion (App. A, *infra*, 44a), we submit that the constitutional violation involved in the detention of respondent could hardly have been less flagrant. The arrest was based on sub-

stantial grounds for suspecting respondent of the robberies (even if not amounting to probable cause), the nature and extent of the detention was a product of weather conditions beyond the officers' control, and the detention itself was relatively brief and involved few of the substantial intrusions, such as handcuffs, booking, fingerprints, or incarceration in a cell, that ordinarily accompany a full custodial arrest.¹⁰

Beyond this, perhaps the most significant considerations in formulating standards governing admissibility of identification testimony by the victim of a crime are the victim's motivations for testifying and the policies of the exclusionary rule. In *Ceccolini* the Court stressed that "the willingness of the witness to freely testify" is a significant factor in the attenuation analysis. 435 U.S. at 276. If that factor is significant in the case of an ordinary witness, whose identity is discovered as the result of some police misconduct, it should be virtually dispositive in the

¹⁰ Furthermore, there was a reasonable basis for the officers' belief that the arrest was authorized by respondent's statements indicating that he might have been a truant. While respondent disputed that the officers had reasonable ground to believe that he was a truant and the officers admitted that their reason for taking him to Park Police headquarters was at least in part for the purpose of investigating the robberies (Tr. 59), nevertheless, at a minimum, the fact that respondent admitted that he had simply walked away from school is relevant in considering the reasonableness (or conversely, the flagrancy) of the officers' actions. We did not argue in the court of appeals that the arrest was legally justified by respondent's possible truancy and thus do not make that contention here.

case of a victim of a crime, who has reported the crime for the very purpose of seeking justice and the protection of the law. In such a case there can be no question that the victim's testimony flows primarily from his or her desire to see justice done. To apply the exclusionary rule in those circumstances so as to "perpetually disable [the] witness from testifying" (435 U.S. at 277) is likely to have the effect, not of "nurturing * * * respect for Fourth Amendment values * * * [but] of generating disrespect for the law and the administration of justice." *Stone v. Powell*, 428 U.S. 465, 491 (1976).¹¹

¹¹ As this Court held in *Ceccolini*, *supra*, 435 U.S. at 276, the motivation of the witness to testify is relevant to the policies of the exclusionary rule because "[t]he greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means and, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness." The same principle applies here, and also underlies the "inevitable discovery" exception to the fruits doctrine applied by several courts of appeals and noted with apparent approval by this Court in *Brewer v. Williams*, 430 U.S. 387, 406 n.12 (1977). See also *Government of Virgin Islands v. Gereau*, 502 F.2d 914, 927-928 (3d Cir. 1974), cert. denied, 420 U.S. 909 (1975); *United States v. Falley*, 489 F.2d 33 (2d Cir. 1973). The more likely it is that routine, legal investigation would have disclosed the evidence that was actually uncovered as the result of some misconduct, the less likely it is that suppression of the evidence will have a deterrent effect on police misconduct. The court of appeals, however, rejected our argument that routine investigation would inevitably have led to identifying respondent as the assailant, in part because it rejected the inevitable discovery doctrine and, alternatively, because it concluded that the facts in the record did not in any event demonstrate that the "evidence would most certainly have been obtained by lawful means" (App. A, *infra*, 34a; footnote omitted). Whether or not the

In contrast to the manifest costs to society of disabling such witnesses, the deterrence benefits of exclusion are questionable. As the original panel decision noted (App. C, *infra*, 80a), the exclusion of the victims' photographic and lineup identifications provides significant disincentives to making unlawful arrests, and the incremental deterrence provided by the suppression of the victim's independent recollection of crime is not likely to be substantial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

RICHARD A. ALLEN
Assistant to the Solicitor General

JEROME M. FEIT
FRANK J. MARINE
Attorneys

NOVEMBER 1978

government must, under the inevitable discovery doctrine, demonstrate to a certainty that the evidence would have been discovered (cf. *United States v. Cales*, 493 F.2d 1215, 1216 (9th Cir. 1974)), the court below erred in rejecting, as essentially irrelevant to the attenuation analysis, the likelihood that respondent's identity would have been discovered through lawful means. Cf. *Brewer v. Williams*, *supra*.

APPENDIX A
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 8507

KEITH CREWS, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court of the
District of Columbia

(Hon. Robert H. Campbell, Trial Judge)

(Argued en banc October 5, 1977
Decided June 14, 1978)

W. Gary Kohlman, Public Defender Service, for appellant.

John W. Polk, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, and *Carl S. Rauh*, Principal Assistant United States Attorney, *John A. Terry*, *Stuart M. Gerson* and *Harry R. Benner*, Assistant United States Attorneys, were on the brief, for appellee.

Before NEWMAN, *Chief Judge*, and KELLY, KERN, GALLAGHER, NEBEKER, YEAGLEY, HARRIS, MACK, and FERREN, *Associate Judges*.

Opinion for the court by *Associate Judge* FERREN, with whom *Chief Judge* NEWMAN and *Associate Judges* KELLY, KERN, GALLAGHER, YEAGLEY, and MACK concur.

Dissenting opinion by *Associate Judge NEBEKER*, with whom *Associate Judge HARRIS* concurs, at p. 55.

Dissenting opinion by *Associate Judge HARRIS*, with whom *Associate Judge NEBEKER* concurs, at p. 56.

FERREN, *Associate Judge*: On February 16, 1977, a division of this court, by a vote of 2-1, affirmed appellant Keith Crews' conviction for armed robbery (D.C. Code 1973, §§ 22-2901 and -3202). *Crews v. United States*, D.C. App., 369 A.2d 1063 (1977). On May 12, 1977, we granted appellant's petition for rehearing en banc and vacated the judgment of February 16. The sole question at the first hearing, and upon rehearing en banc, is whether the robbery victim's in-court identification of appellant Crews should have been suppressed as evidence obtained by official exploitation of an unlawful arrest, in violation of his Fourth Amendment rights.

On the facts of this case, we hold that the in-court identification should have been excluded from appellant's trial. His conviction accordingly must be reversed.

Our analysis proceeds, in Part I, with an explication of the facts and the trial court proceedings, followed in Part II with a discussion of the threshold issue: whether the case concerns merely the suppression of evidence (as appellant contends) or actually amounts to an untenable request for dismissal of the charges (as the government maintains). After concluding that "suppression of evidence" is the correct characterization, we turn to the question of the appropriateness of suppression. Part III addresses the Fourth Amendment exclusionary rule—its history (Section A) and relevance to the facts of this case (Section B), followed by analysis and application of the three commonly advanced exceptions to the rule: "independent source" (Section C), "inevitable

discovery" or "hypothetical independent source" (Section D), and "attenuation" (Section E). After finding these exceptions to be inapplicable, we conclude by holding that the police conducted an unconstitutional "investigatory arrest." The evidentiary results of such an arrest—including the contested identification testimony here—cannot lawfully be admitted at trial.

I. FACTUAL BACKGROUND AND TRIAL COURT PROCEEDINGS

On January 3, 1974, at approximately 11:30 a.m., a woman was accosted in a restroom in the vicinity of the Washington Monument. The assailant, a 15- to 18-year-old, slender, black male with a smooth complexion, approached the victim's stall and demanded \$10.00. The victim initially refused, but she surrendered the sum when the robber revealed a gun. After requesting \$10.00 more and ascertaining that the woman did not have it, the young man gained entry to the stall and made sexual advances and requests. The victim pleaded with the assailant to stop and to leave. He soon did, warning her as he departed not to emerge from the restroom for 20 minutes; otherwise, he said, he would shoot her. The woman complied, then reported the incident to the police.

Two other women were similarly robbed and assaulted in the same Monument restroom during the mid-afternoon hours of January 6, 1974. Threatening the women with a broken bottle, the assailant (whose description matched the January 3 robber) compelled them to turn over \$20.00, then departed, again advising the victims not to leave for 20 minutes. The women reported this incident to the police.

Three days later, in the early afternoon of January 9, 1974, Officer David Rayfield of the United States Park Police observed appellant in the area of the Washington

Monument concession stand. Aware of the January 3 and 6 robberies and of a police "lookout" describing the perpetrator as a young black man 15-18 years old and slender in build—and believing that appellant resembled this description—the officer and his partner, Officer Barg, approached appellant. Upon being questioned, appellant disclosed that his name was Keith Crews, his age was sixteen, and he was not in school because he had "walked away." After this three-to-five-minute encounter, during which the officers apprised Mr. Crews of his likeness to the robbery suspect's description, the officers allowed him to go on his way. They watched him enter a nearby men's room.

Moments later, Officer Rayfield saw and summoned James Dickens, a tour guide. The officer knew that Mr. Dickens had seen "a subject" in the area on January 3, the date of the first robbery. When appellant exited from the men's room, Mr. Dickens told Officer Rayfield that appellant looked like the person he had observed on January 3. His suspicions bolstered by this report, the officer again stopped and detained Mr. Crews. This time, Officer Rayfield summoned Detective Ore of the United States Park Police, the investigator assigned to these robberies, in order to have him view the individual who resembled the lookout description. Detective Ore arrived ten to fifteen minutes later. When inhospitable weather frustrated the detective's intent to obtain on-the-scene photographs for display to the robbery victims, he transported Mr. Crews to headquarters. The police held him for one hour, obtained the desired photographs, and then released him.

At a photographic array session conducted the next day, the victim of the first crime identified appellant. One of the two January 6 victims made a like identifica-

tion on January 13. On January 16, the court ordered appellant Crews (who apparently had been reapprehended) to appear in a lineup on January 21, where he was positively identified by the two women who had made the photographic identifications.

The grand jury returned an indictment on February 22, 1974, charging Keith Crews with two counts of armed robbery (D.C. Code 1973, §§ 22-2901, -3202), two counts of robbery (D.C. Code 1973, § 22-2901), one count of attempted armed robbery (D.C. Code 1973, §§ 22-2902, -3202), and three counts of assault with a dangerous weapon (D.C. Code 1973, § 22-502). On April 22, 1974, after a hearing on appellant's motion to suppress, the trial court determined that because the government lacked probable cause to arrest, it could not introduce the photographic or lineup identifications into evidence. The court, however, decided to permit the in-court identification.

Trial commenced immediately. Defendant Crews interposed alibi defenses to all charges. On the next day, April 23, the jury returned verdicts of not guilty on all counts but the first. He was convicted of armed robbery founded upon the events of January 3.¹ Pursuant to the Youth Corrections Act, 18 U.S.C. § 5010 (a) (1970), the trial judge sentenced Keith Crews to four years' probation. He now appeals the conviction,

¹ Although appellant was but sixteen years old, he was prosecuted as an adult in the Criminal Division by virtue of D.C. Code 1973, § 16-2301 (3) (A), which excludes from the definition of "child" (for purposes of Family Division jurisdiction),

An individual who is sixteen years of age or older and—

(A) charged by the United States Attorney with
... robbery while armed

maintaining that the first victim's in-court identification was tainted by the illegality of his arrest and, as a result, was necessarily subject to suppression by virtue of the Fourth Amendment to the Constitution of the United States.

II. SUPPRESSION OF EVIDENCE VERSUS DISMISSAL OF THE CHARGE

Appellant casts his appeal in suppression-of-evidence terms. The government, however, maintains that there is no "evidence" to be suppressed; it argues that appellant's goal should be characterized, more realistically, as prevention of his prosecution with consequent dismissal of the charges. It follows, according to the government, that appellant's effort runs afoul of the longstanding, well-recognized, and still vital principle that an illegal arrest cannot serve to bar a prosecution or nullify a conviction that results from a fairly conducted trial. *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886). Accordingly, we must first interpret the meaning and scope of the *Frisbie-Ker* doctrine and then determine whether the relief sought by appellant runs contrary to the constitutional authority of those two cases.

A. The *Frisbie-Ker* Doctrine

In *Frisbie v. Collins*, *supra*, and *Ker v. Illinois*, *supra*, the Supreme Court was confronted with claims that the forcible abduction of the defendants by government agents for the purpose of subjecting them to the jurisdiction of the respective trial courts violated due process. Defendants accordingly claimed that their convictions had to be voided. In both cases the Court held that the Constitution did not require the state courts to decline jurisdiction.

[T]he power of a court to try a person for a crime is not impaired by the fact that he [has] been brought within the court's jurisdiction by reason of a "forcible abduction." . . . [D]ue process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will. [*Frisbie*, *supra* at 522 (footnote omitted).]

The holdings of the Court are actually quite clear and simple. "These cases established that a criminal court could exercise jurisdiction over a defendant however his presence has been obtained." 88 HARV. L. REV. 813, 815 (1975).² Clarity and simplicity notwithstanding,

² The Supreme Court recently has offered its own summaries of the *Frisbie-Ker* principle. In *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975), the Court observed "the established rule that illegal arrest or detention does not void a subsequent conviction." Similarly, in *Stone v. Powell*, 428 U.S. 465, 485 (1976), the Court acknowledged the "proposition that judicial proceedings need not abate when the defendant's person is unconstitutionally seized." These two expressions reveal an important, often overlooked, aspect of the *Frisbie-Ker* doctrine: due process *tolerates* such compulsory attendance at trial; it does not *require* a court to decline jurisdiction or dismiss a case. But *Frisbie-Ker* does not limit a court's power to reject jurisdiction on nonconstitutional grounds. The *Ker* court, in fact, specifically stated that it would not be averse to a trial court's refusal to sanction the prosecution of an abducted defendant on other than due process grounds; "the decision of that question is as much within the province of the state court, as a question of common law, or of the law of nations, of which that court is bound to take notice, as it is of

the continuing validity of *Frisbie-Ker* is frequently questioned. We therefore must resolve the dispute over *Frisbie-Ker*'s current status.

At least one commentator has maintained that developments in due process doctrine since *Frisbie*—especially the evolution of the exclusionary rule—cast serious doubt upon the present validity of *Frisbie-Ker*. See Pitler, *The Fruit of The Poisonous Tree, Revised and Shepardized*, 56 CALIF. L. REV. 579, 599-601 (1968). At least one court, in fact, has endorsed this position by specifically rejecting *Frisbie-Ker* in a case of flagrant international abduction and torture. *United States v. Toscanino*, 500 F.2d 267, 273-75 (2d Cir. 1974).³ Two other circuit court opinions have referred to the criticism and possible decline of *Frisbie-Ker*'s authority. *United States v. Edmons*, 432 F.2d 577, 583 (2d Cir. 1970); *Government of the Virgin Islands v. Ortiz*, 427 F.2d 1043 (3d Cir. 1970). Nonetheless, a greater number of circuits has acknowledged the endurance of the doctrine. *United States v. Herrera*, 504 F.2d 859 (5th

the courts of the United States." *Id.* at 444. Accordingly, *Frisbie-Ker* does not foreclose the court's option to refuse to conduct the trial of a forcibly abducted defendant in the exercise of its supervisory powers over the administration of criminal justice. See *United States v. Toscanino*, 500 F.2d 267, 276 (2d Cir. 1974).

³ Although the *Toscanino* court clearly repudiated *Frisbie-Ker*, the court's conclusion that it lacked jurisdiction was also supported by at least two nonconstitutional rationales: (1) the federal court's supervisory power over criminal justice, with reference to preserving its own dignity, and (2) specific treaty violations. The Second Circuit specifically distinguished both *Frisbie* and *Ker* on these grounds. Furthermore, one commentator has pointedly observed that the abandonment of *Frisbie-Ker* was wholly unnecessary on the egregious facts of *Toscanino*. 88 HARV. L. REV. 813, 817 (1975).

Cir. 1974); *United States v. Cotten*, 471 F.2d 744, 748-49 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973); *United States ex rel. Calhoun v. Twomey*, 454 F.2d 326 (7th Cir. 1971); *United States v. Sherwood*, 435 F.2d 867 (10th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971); *Sewell v. United States*, 406 F.2d 1289 (8th Cir. 1969). See also *United States v. Friedland*, 441 F.2d 855 (2d Cir.), *cert. denied*, 404 U.S. 867 (1971). Most important, the Supreme Court recently has indicated that *Frisbie-Ker* is still good authority. *Stone v. Powell*, 428 U.S. 465, 485 (1976); *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975). Consequently, we feel bound by the *Frisbie-Ker* principle.

While we acknowledge such continuing validity, we also must underscore that *Frisbie-Ker* does not conflict with, let alone delimit, the exclusionary rule of the Fourth Amendment announced in *Weeks v. United States*, 232 U.S. 383 (1914) and extended to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961). Each principle reigns supreme in its own sphere: *Frisbie-Ker* in holding that under the due process clause, the conduct of a prosecution is not prevented by, nor is a conviction voided by, the illegal seizure of the person of the defendant; and *Weeks-Mapp* in holding that under the Fourth and Fourteenth Amendments, illegally seized evidence must be excluded from federal and state criminal prosecutions. In summary, *Frisbie-Ker* deals with a court's capacity to pursue the overall criminal process against a particular defendant, without regard to the evidence that may be introduced. *Weeks-Mapp*, on the other hand, treats only a limited portion of the criminal process—the admission of particular evidence against a defendant who is properly before the court. Thus, the two doctrines, as such, do not conflict. See *M.A.P. v. Ryan*, D.C.App., 285 A.2d 310,

315 (1971); *District of Columbia v. Perry*, D.C.App., 215 A.2d 845, 847 (1966).⁴

We now inquire whether the present case is better characterized by reference to *Frisbie-Ker* or to *Weeks-Mapp*.

⁴ We should note that *Ker* itself did not foreclose reliance upon a constitutional violation as the basis for seeking a remedy other than dismissal of a prosecution (e.g., the suppression remedy). By way of limitation upon its holding, the Court stated:

We do not intend to say that there may not be proceedings previous to the trial, in regard to which the prisoner could invoke in some manner the provisions of this clause of the Constitution, but, for mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment. [*Id.* at 440.]

Also, it is important to stress that the *Frisbie-Ker* doctrine is specifically narrowed by the necessity that all trials, including those which do proceed despite illegal apprehensions, must be "fair" and "in accordance with constitutional procedural safeguards." *Frisbie*, *supra* at 522. The doctrine clearly was not intended to abrogate the Fourth Amendment for trials conducted under its authority. We therefore find in the very language of the two seminal cases additional support for our conclusion that *Frisbie-Ker* does not encroach upon the exclusionary rule of *Weeks-Mapp* and must be understood and applied in light of that rule.

Finally, there is another significant limitation on *Frisbie-Ker*. While that doctrine allows the government to pursue a prosecution, with properly obtained evidence, against an illegally arrested defendant, it by no means infringes on a defendant's Fourth Amendment "right to be released from unlawful custody following an arrest made without a warrant or without probable cause." *Brown v. Illinois*, 422 U.S. 590, 601 n.6 (1975). Undoubtedly, unless the government possesses adequate untainted evidence of probable cause, a forcibly abducted defendant is entitled to habeas corpus relief.

B. Due Process Dismissal or Fourth Amendment Exclusion?

The government contends that appellant actually seeks a due process dismissal, precluded by *Frisbie-Ker*, because (1) the in-court identification does not constitute suppressible "evidence", and because (2) dismissal of the charges is the necessary consequence of granting the relief sought. We reject both government arguments. We perceive appellant's claim to be merely the assertion of a constitutional right to exclusion of illegally obtained evidence. Because (as indicated above) such Fourth Amendment relief is consonant with *Frisbie-Ker*, this latter doctrine poses no impediment to the appeal,

Implicit in the government's first argument (that there is no "evidence" to suppress) is a purported distinction between types of evidence for exclusionary rule purposes. Legal precedent, however, is to the contrary. For the purpose of determining whether evidence is subject to suppression,

there is "no reasonable or logical basis for any distinction between inanimate (tangible) and animate (testimonial) evidence." [*People v. Dentine*, 21 N.Y.2d 700, 703, 234 N.E.2d 462, 463, 287 N.Y.S.2d 427, 429 (1967) (Fuld, C.J., dissenting). See *United States v. Schipani*, 289 F.Supp. 43, 59 (E.D.N.Y. 1968).]

It is beyond question that testimony is a proper target for Fourth Amendment suppression. Indeed, the Fourth Amendment landmark, *Wong Sun v. United States*, 371 U.S. 471 (1963), so held.⁵ Numerous other cases, in fact,

⁵ "Thus, verbal evidence which derives so immediately from unlawful entry and an unauthorized arrest as the officer's action in the present case is no less the 'fruit' of official illegality

have also made clear that all kinds of identification evidence, whether in the form of testimony about a pretrial lineup, showup, or photographic array, or of testimony confirming an in-court identification, are the proper subject of a suppression motion under the Fourth, Fifth, and Sixth Amendments. See *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Stovall v. Denno*, 388 U.S. 293 (1967); *Gilbert v. California*, 388 U.S. 264 (1967); *Wade v. United States*, 388 U.S. 218 (1967); *Gatlin v. United States*, 117 U.S.App.D.C. 123, 130, 326 F.2d 666, 673 (1963). See also *Payne v. United States*, 111 U.S.App.D.C. 94, 97, 294 F.2d 723, 726 (1961).

We therefore cannot endorse the government's argument that the suppression of courtroom identification testimony necessarily transgresses *Frisbie-Ker* because it is not "evidence." No one disputes that in-court identification testimony presupposes the defendant's presence at

than the more common tangible fruits of [an] unwarranted intrusion." *Id.* at 485 (footnote omitted). See also *Harrison v. United States*, 392 U.S. 219 (1968) (testimony at first trial excluded from second trial); *Abbott v. United States*, D.C. Mun.App., 138 A.2d 485 (1958) (testimony of officers regarding illegally obtained observations and admissions is excludable); *Smith v. United States*, 120 U.S.App.D.C. 160, 344 F.2d 545 (1965) (testimony of two witnesses that defendants sold them stolen property is excludable); *Edwards v. United States*, 117 U.S.App.D.C. 383, 330 F.2d 849 (1964) (testimony of witness whose name was unlawfully obtained is suppressible).

In *United States v. Ceccolini*, 98 S.Ct. 1054 (1978), the Supreme Court specifically reaffirmed *Wong Sun's* holding that "verbal evidence," like "tangible fruits," can be subject to Fourth Amendment suppression. *Ceccolini*, *supra* at 1059. The Court noted, however, that attenuation analysis may make "verbal evidence" less suppressible under certain circumstances than "physical evidence." See text in Part III.E.3. and note 37, *infra*.

trial, and that in this sense the evidence cannot ripen until trial. But the converse is not true; contrary to the government's contention, exclusion of identification testimony does not require that a defendant be absent from trial, in derogation of *Frisbie-Ker*. The exclusionary principle merely prevents a particular witness from testifying. Thus, only the exclusion of evidence, not the prevention or nullification of a prosecution, is directly at stake. In line with compelling authority, we find suppressible evidence at issue.⁶

⁶ The government cites *Payne v. United States*, 111 U.S.App.D.C. 94, 294 F.2d 723 (1961), where the court rejected appellant's Fourth Amendment challenge to an in-court identification by the complaining witness:

The consequence of accepting appellant's contention in the present situation would be that [the witness] would be forever precluded from testifying against [the appellant] in court, merely because he had complied with the request of the police that he come to police headquarters and had there identified [the appellant] as the robber. Such a result is unthinkable. The suppression of the testimony of the complaining witness is not the right way to control the conduct of the police, or to advance the administration of justice. The rights of the accused in a case like the present are adequately protected when the complaining witness takes the stand in open court, for examination and cross-examination. *Cf. Frisbie v. Collins*, 1952, 342 U.S. 519, 522, 72 S.Ct. 509, 96 L.Ed. 541. [*Payne v. United States*, *supra* at 98, 294 F.2d at 727.]

Insofar as that opinion implies a basis for distinction between suppressibility of tangible and testimonial evidence, it cannot be reconciled with the weight of authority. Further, if the court's intention was to isolate in-court identifications as a special category exempt from the demands of the exclusionary rule, we can, as noted above, find no support for that conclusion. Finally, perhaps some readers will understand the *Payne* court to have implied that the reliability of in-court identification testimony provides a reason for its exemption from the exclusionary rule. The reliability of evi-

The government attempts, second, to erect another *Frisbie-Ker* roadblock by contending that because dismissal must inevitably result from the suppression of the complainant's courtroom identification testimony, *Frisbie-Ker* is properly invocable to preserve the identification and thus preclude the forbidden dismissal. Again, the government misses the target. *Frisbie-Ker* held that an illegal arrest, in itself, does not furnish a due process basis for a court's refusal of jurisdiction and the consequent dismissal of a criminal prosecution. The Supreme Court, however, did not hold that if suppression of illegally obtained evidence would result in dismissal of a case for lack of sufficient evidence overall, then the evidence must be admitted—despite the Fourth Amendment—to keep the case alive. And yet the government's argument, in effect, is precisely that.

"[T]he exclusion of evidence resulting from an illegal arrest does in some cases effectively deprive the state of any possibility of convicting the defendant." 88 HARV. L. REV. 813, 816 n.22 (1975). Yet, the doctrine of *Frisbie-*

dence is irrelevant in determining whether it is of a character suitable for suppression under the Fourth Amendment.

The exclusionary rule was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amendment. *To make an exception for illegally seized evidence which is trustworthy would fatally undermine these purposes.* [*Davis v. Mississippi*, 394 U.S. 721, 724 (1969) (emphasis added).]

See the text at note 16, *infra*. Indeed, much tangible evidence (e.g., narcotics) which commonly is suppressed is of the highest probative value—as much so as testimonial evidence. Therefore, we reject *Payne's* intimation that for exclusionary rule purposes, in-court identifications are categorically separable (on the ground of high reliability) from other forms of evidence, and that their suppression somehow runs afoul of the *Frisbie-Ker* doctrine.

Ker is not concerned with such indirect, "effective" preclusion of the government's opportunity to prevail. *Frisbie-Ker*, rather, is concerned only with dismissals directly attributable to the fact of the illegal arrest itself, without regard to the government's evidence. Were the government's argument to be accepted, the exclusionary rule would be substantially vitiated, for the consequence of suppression is often the impossibility of successful prosecution. The Supreme Court, however, has adopted the exclusionary rule and continued to apply it with full awareness of the *Frisbie-Ker* doctrine and of the primary criticism that "[t]he criminal is to go free because the constable has blundered." *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587, *cert. denied*, 270 U.S. 657 (1926). We therefore find the government's "necessity of dismissal" argument to be without merit.⁷

In summary, we hold that the principles of *Frisbie* and *Ker* present no barrier to appellant Crews in seeking the exclusion of illegally obtained identification evidence. We therefore turn to the overriding issue: the appropriate-

⁷ We also note that the present case is distinguishable from those which have expressed disapproval at the prospect of

life-long immunity from investigation and prosecution simply because a violation of the Fourth Amendment first indicated to the police that a man was not the law-abiding citizen he purported to be. . . . [*United States v. Friedland*, 441 F.2d 855, 861 (2d Cir.), *cert. denied*, 404 U.S. 867 (1971).]

Appellant receives no immunity by virtue of our decision in this case. As will become apparent, we merely require the suppression of specifically and sufficiently tainted "fruits" of a Fourth Amendment violation. *Friedland*, *supra*, and similar cases cast no doubt on the justifiability and rationality of such a result. See, e.g., *Bond v. United States*, D.C.App., 310 A.2d 221 (1973); *Gisendanner v. Wainwright*, 482 F.2d 1293 (5th Cir. 1973).

ness of Fourth Amendment suppression of the in-court identification.

III. THE FOURTH AMENDMENT EXCLUSIONARY RULE

In order to resolve the Fourth Amendment issue, we seek guidance from the origin and development of the exclusionary rule.

A. Brief History of the Exclusionary Rule

In 1914, the Supreme Court adopted the exclusionary rule in *Weeks v. United States*, *supra*.^{*} There, the Court held that a proscription against governmental use of illegally obtained evidence was vital to preservation of Fourth Amendment rights. Six years later, in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), the Court announced that not only direct products of official illegality but also secondary, *i.e.*, derivative, results must be excluded under this Fourth Amendment rule. In announcing this extension of the rule, the Court stated a limit on how far the rule extended. It fashioned the first of the exceptions: "If knowledge of [facts] is gained from an *independent source* they may be proved like any others" *Id.* at 392 (emphasis added). Almost twenty years later, in *Nardone v. United States*, 308 U.S. 338 (1939), the Court reconfirmed the principle that derivative products are suppressible, characterizing them as the

^{*} In *Weeks* the Court promulgated an exclusionary rule for the federal courts. Later, the Court held that although the Fourth Amendment was incorporated into the Fourteenth Amendment, the exclusionary rule would not be applied to the states. *Wolf v. Colorado*, 338 U.S. 25 (1949). In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court recanted and imposed the exclusionary rule on state law enforcement officials and courts. The Fourth Amendment, of course, is directly applicable in the District of Columbia.

"fruits of the poisonous tree." *Id.* at 340-41. The Court then announced a second exception to the exclusionary rule: the connection between the illicit official conduct and the evidence yielded "may have become so *attenuated* as to dissipate the taint." *Id.* at 341 (emphasis added).

After more than another two decades, in 1963, the Court issued its landmark opinion in *Wong Sun*, *supra*, in which it reviewed and endorsed the holdings of *Silverthorne*, *supra*, and *Nardone*, *supra*, before endeavoring more specifically to describe where the boundary line between exclusion and admission should be drawn.⁹ In the oft-quoted statement that characterizes *Wong Sun*, the Court opined:

We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, *Evidence of Guilt*, 221 (1959). [371 U.S. at 487-88.]

In all cases involving secondary (derivative) "fruits," such as the identification challenged in the present case, this standard is the inevitable point of departure and basis for assessment.

In recent years, the exclusionary rule has endured a hailstorm of criticism, and yet the foundational princi-

⁹ *Wong Sun* was not intended to expand the exclusionary rule but rather to delimit the category of "tainted fruits." *United States v. Friedland*, *supra* at 860.

ples sketched above have generally survived.¹⁰ Recently, there has been an increasing emphasis on implementation of the rule by reference to its underlying purposes. See *Brown v. Illinois*, 422 U.S. 590 (1975).¹¹ We take that approach in the present case.

B. *The Fourth Amendment Violation in the Present Case*

The trial judge found that when the officers arrested Keith Crews on the morning of January 9, 1974, and transported him to police headquarters, they lacked probable cause to arrest him for any crime. Accordingly, the judge suppressed the photographic array and lineup identifications. He did not, however, exclude the courtroom identification, for he concluded that there was an "independent source" for it.

Appellant maintains that the court either did not engage in, or at least did not appropriately conduct, the Fourth Amendment inquiry in arriving at the "independent source" conclusion. The government takes issue with the court's probable cause determination; but, as-

¹⁰ See, e.g., *Stone v. Powell*, *supra* at 496 (Burger, C.J., concurring); *Brewer v. Williams*, 430 U.S. 387, 416 (1977) (Burger, C.J., dissenting).

¹¹ The dual purpose underlying the exclusionary rule was explained by the Court in *Elkins v. United States*, 364 U.S. 206 (1960):

The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective way—by removing the incentive to disregard it. [*Id.* at 217.]

....

[T]here is [also] another consideration—the imperative of judicial integrity. [*Id.* at 222.]

suming the lack of probable cause to arrest, it urges this court to affirm the finding of an "independent source" for the courtroom identification.

We are compelled to accept the trial court's appraisal that there was no probable cause to arrest.¹² The government did not appeal that determination and the resulting evidentiary suppression. In any event, the trial judge's conclusion was correct on the facts.¹³ Keith Crews' presence at the scene of the robberies, his minimal resemblance to the quite general description of the assailant, and his weak, very tenuous identification by tour guide Dickens, did not constitute probable cause to believe that he had participated in the robberies and assaults.

Having affirmed the Fourth Amendment violation—the unlawfulness of Keith Crews' arrest—we must inquire whether the trial court erred in concluding that the courtroom identification was not the result of official "exploitation" of the "primary illegality" within the meaning of *Wong Sun*.

¹² We have encountered some difficulty in resolving this case because of the absence of any specific written or oral findings and conclusions by the trial court. Although the impediment in this case has not been too serious, we are concerned for the future. We therefore take this opportunity to urge the trial courts to make clear their particular factual findings and legal conclusions at suppression hearings. As will become clearer later in this opinion, exclusionary determinations hinge upon the interaction of myriad factors, and proper application of the analytical criteria depends upon awareness of the precise circumstances. Our appellate task when suppression of evidence is at issue demands an intelligible, complete record.

¹³ At this juncture it is sufficient to determine that probable cause was lacking. The exact nature—that is, the egregiousness or innocence—of the constitutional transgression, will be treated later. See Part III.E.3., *infra*.

C. Causation and the "Independent Source" Exception

The initial question in assessing the asserted "exploitation" is whether the unlawful police behavior had a causal relationship to obtainment of the contested identification testimony.¹⁴ Obviously, this evidence cannot be the product of exploitation if an official violation did not actually lead to or "cause" its acquisition. (Or, as expressed in *Wong Sun*, the evidence must have been "come at by" the exploitation. 371 U.S. at 488.) If, in the words of *Silverthorne*, *supra*, the courtroom identification arose instead from an "independent source," it cannot be tainted.¹⁵

The causal chain posited by appellant runs as follows: the unlawful arrest produced photographs which were shown to the complaining witnesses who, as a result, identified appellant; this resulted in his reappréhension, which yielded a court-ordered lineup identification and, eventually, in-court identification testimony during prosecution of the case. Thus, appellant says, the courtroom identification testimony was "actually discovered by" (i.e., made available to the government through) "a process initiated by the unlawful act." *United States v. Paroutian*, 299 F.2d 486, 489 (2d Cir. 1962).

Once a defendant makes a sufficient *prima facie* showing of illegality and a causal connection to the alleged fruit, the burden of producing evidence that will bring the case within one or more exceptions to the exclusionary

¹⁴ For a general discussion of causation, see Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. CRIM. L.C. & P.S. 307, 310 *et seq.* (1964) (hereafter "Maguire").

¹⁵ For a discussion of how "independent source" analysis under the Fourth Amendment differs from such analysis under the Fifth Amendment, see text at note 16, *infra*.

rule rests squarely upon the prosecution. See *Alderman v. United States*, 394 U.S. 165, 183 (1969); Note, *The Inevitability Exception to the Constitutional Exclusionary Rules*, 74 COLUM. L. REV. 88, 90 n.21 (1974) (hereafter "COLUM."). Appellant Crews clearly demonstrated a causal connection between the unlawful arrest and the in-court identification in this case. The onus thus shifted to the government.

Endeavoring to satisfy the independent-source exception, the government relies upon the victim's memory and abilities. She could identify him, the government argues, without regard to how he came to be in court or to the pretrial identification procedures in which she had participated. This argument is unsound, for it confuses "independent source" doctrine under the Fourth Amendment with due process analysis under the Fifth Amendment.

When an in-court identification is contested under the Fifth Amendment on the basis of a "suggestive" pretrial identification procedure, the concern is the "reliability" of the identification. See *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972); *Simmons v. United States*, 390 U.S. 377 (1968); *Stovall v. Denno*, *supra*. See also *Patterson v. United States*, D.C. App., 384 A.2d 663 (1978). Thus, the Fifth Amendment question is whether, under the "totality of the circumstances," the witness' identification is reliable enough, based on a previous, independent observation of the defendant, to withstand challenge on the ground that the pretrial procedure must have distorted the witness' perceptions. See *Manson*, *supra*; *Neil*, *supra*. When the courts find such reliability, they often characterize the identification as having an "independent source," i.e., independent of the suggestive pretrial procedure. See *Clemons v. United States*, 133 U.S.App.D.C. 27, 34, 408

F.2d 1230, 1237 (1968) (en banc), *cert. denied*, 394 U.S. 964 (1969). It is this kind of reliability analysis that the government apparently advances here.

The Fourth Amendment concern, however, is not reliability of evidence; it is deterrence of illegal searches and seizures by exclusion of unlawfully obtained evidence. Thus, the Fourth Amendment has an altogether different type of "independent source" exception. By definition, all evidence that is the product of—i.e., has been "come at by exploitation of"—the official misconduct has no "independent source"; it is dependent on, and thus derived from, the violation of Fourth Amendment rights itself. Thus, it must be excluded *no matter how reliable*. *Wong Sun v. United States*, *supra*.¹⁶ In summary, with regard

¹⁶ As applied to identification evidence, this Fourth Amendment concern about deterrence—and the exclusionary rule response—are akin to the Sixth Amendment policy barring admission of a pretrial identification when an accused's right to counsel at that critical stage of the proceeding has been violated. *See Moore v. Illinois*, 98 S.Ct. 458 (1977); *Gilbert v. California*, 388 U.S. 263 (1967). In a Sixth Amendment case, however, although the initial identification (absent counsel) is suppressed, a later in-court identification will be permitted if the witness's ability to identify is based on an unquestionably reliable "source" or "origin" independent of the pretrial identification (which was presumed to be suggestive in the absence of defense counsel). *See United States v. Wade*, 388 U.S. 218 (1967). Application of the Sixth Amendment exclusionary rule, therefore, involves a dual purpose—reliability and deterrence—neither of which is necessarily offended by admission of an identification subsequent to the one when counsel was absent. The concern about reliability is met by the same type of independent source test employed in Fifth Amendment analysis. *Compare Wade, supra*, and *Manson, supra*. And deterrence of Sixth Amendment violations by the conduct of initial identifications without defense counsel present is deemed satisfied by the initial suppression, since acqui-

to independent-source inquiry (but without regard to other possible exceptions to the exclusionary rule), the Fourth Amendment requires exclusion of all evidence, including identification testimony, that is directly traceable to—is causally related to—unlawful official behavior.

There is another perspective that helps make the constitutional distinctions clear. A Fifth Amendment violation will never occur unless unreliable evidence is introduced at trial. Thus, a defendant's due process rights will be protected if a witness' ability to identify is shown to be reliable irrespective of any suggestiveness at a pretrial identification; the pretrial taint will never cause a Fifth Amendment violation. A Fourth Amendment transgression, however, becomes an accomplished fact at the time of the illegal search or seizure. Thus, the exclusionary rule cannot prevent or adequately redress the present violation of Keith Crews' rights—nor is its purpose to do so. *Elkins v. United States*, 364 U.S. 206, 222 (1960). Its goal, rather, is to deter future constitutional transgressions. *Id.* Unless the court excludes identification testimony that is obtained by unlawful arrest and confrontation with the witness, this "fruit" of the illegality will surface at trial; and the Fourth Amendment's deterrent purpose will be frustrated. Because the strength of a witness's independent ability to identify has no bearing on the means of obtaining evidence, it is

sition of later identification evidence has no significant causal relation to the initial absence of counsel.

In our Fourth Amendment situation, however, the in-court identification remains causally related to the unlawful arrest, for that arrest led directly to production of the courtroom evidence. Thus, absent suppression, the deterrent purpose of the exclusionary rule would be frustrated (unless the attenuation exception is applicable). *See Part III.E., infra.*

irrelevant to the Fourth Amendment exclusionary purpose.

It follows, therefore, that the "independent source" exception under the Fourth Amendment, when identification evidence is an issue, cannot be satisfied by reference to a witness' independent capacity to identify; that is the wrong question. The Fourth Amendment exception is limited to an identification that has been *acquired wholly apart from* the illegal seizure. Such an independent source might include, for example, an identification of the accused by the same witness after a lawful arrest on another charge, or an identification by the same witness to a different team of detectives who had included a lawfully obtained picture of the accused in a standard photographic array. For Fourth Amendment purposes, however, there can be no "independent" source for an identification that "stems from" the very illegality at issue. See *United States v. Paroutian*, *supra* at 489.

In this case, the government proffers no independent source of the disputed identification evidence unrelated to appellant Crews' illegal apprehension; it therefore has not carried the burden of showing that the challenged evidence was "in no way connected with the unlawful arrest." *Bynum v. United States*, 107 U.S.App.D.C. 109, 274 F.2d 767 (1960). We conclude that the contested identification cannot be excepted from suppression under the *Wong Sun-Silverthorne* "independent source" test.¹⁷

¹⁷ Mr. Justice Powell acknowledged the threshold nature of an actual causation determination when he concluded:

[C]ompeting considerations [become] involved in a determination to exclude evidence *after finding* that official possession of that evidence was to some degree *caused by* a violation of the Fourth Amendment. [*Brown v.*

An affirmative answer to the causation question, however, by no means ends the discussion about exploitation of the illegality. The government has suggested other exceptions to the exclusionary rule—to which we now turn.

B. *The "Inevitable Discovery" or "Hypothetical Independent Source" Doctrine*

The so-called "inevitable discovery" exception to the exclusionary rule permits the government to "unpoison fruits" of official illegality by demonstrating that the evidence acquired by such exploitation also would inevitably have been obtained by legal means.¹⁸ The origin of this principle can be traced to the Supreme Court's independent source doctrine promulgated in *Silver-*

Illinois, *supra* at 607 (Powell, J., concurring in part; emphasis added).]

Thus, it is the *existence* of a causal chain—of "some degree" of actual causation—that is tested by an independent source assault. The *strength* of the causal chain—the question whether the illegality is of sufficient force to require exclusion of resulting evidence—is the focus of "attenuation" analysis. See Part III.E., *infra*. When viewed in this light, it is evident that for exclusionary rule purposes the in-court identification of Mr. Crews was actually caused by—it was the product of—the Fourth Amendment wrong.

¹⁸ See Note, *Inevitable Discovery: The Hypothetical Independent Source Exception to the Exclusionary Rule*, 5 HOFSTRA L. REV. 137 (1976) [hereafter "HOFSTRA Note"]; Note, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules*, 74 COLUM. L. REV. 88 (1974) [hereafter "COLUM."]; Pitler, *"The Fruit of the Poisonous Tree": Revisited and Shepardized*, 56 CAL. L. REV. 579, 627-30 (1968) [hereafter "Pitler"]; Maguire, *supra*.

thorne;¹⁹ but its introduction of supposition into the analysis—its reliance on a hypothetical independent source—is a substantial departure from the actual, independent-causation rationale which underlies that doctrine. Despite the recognition by two Justices that “[i]t is a significant constitutional question whether the ‘independent source’ exception to inadmissibility of fruits, *Wong Sun*, *supra* at 487-88, encompasses a hypothetical as well as an actual independent source,” *Fitzpatrick v. New York*, 414 U.S. 1050 (1973) (White, J. & Douglas, J., dissenting from denial of certiorari), the Supreme Court has declined the invitation to pass upon the validity of such an exception. See *United States v. Ceccolini*, 98 S.Ct. 1054, 1058 (1978); *United States v. Castellana*, 488 F.2d 65, 68 (5th Cir.), *modified en banc*, 500 F.2d 325 (1974).²⁰ We are therefore left to examine the varied opinions of the lower courts, in light of the purposes of the exclusionary rule, in deciding whether to adopt the “inevitable discovery” exception and, if so, whether to apply it to the circumstances here.

The inevitability asserted by the government in this case—a hypothetical chain of events between the police officers’ initial sighting of Keith Crews at the Monument and his eventual identification by the victims—is premised on an argument that discovery of the contested evidence would have resulted from the diligent pursuit of “routine police investigatory procedures.” See COLUM.,

¹⁹ The inevitable discovery doctrine has been denominated “[t]he major attempt to flesh out the ‘independent source’ standard . . .” COLUM., *supra* at 90.

²⁰ The Seventh Circuit’s contrary conclusion in *United States ex rel. Owens v. Twomey*, 508 F.2d 858, 865 (7th Cir. 1974) betrays a strained, untenable reading of *Wong Sun* and its progeny.

supra at 91. The government claims, in other words, that the in-court identification is admissible simply because the police would have identified and photographed Mr. Crews anyway, as a routine matter, as a result of evidence legally obtained during the stop, prior to arrest.

Individual courts have revealed significant internal divisions over the propriety of relying on such inevitable discovery. See *People v. Fitzpatrick*, 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793, *cert. denied*, 414 U.S. 1033 (1973); *Commonwealth v. Garvin*, 448 Pa. 258, 293 A.2d 33 (1972). Legal commentary has both condemned inevitability doctrine (Pitler, *supra*) and condoned it. Note, *Inevitable Discovery: The Hypothetical Independent Source Exception to the Exclusionary Rule*, 5 HOFSTRA L. REV. 137 (1976) (hereafter “HOFSTRA Note”); Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. CRIM. L.C. & P.S. 307 (1964) (hereafter “Maguire”). We find the Second Circuit’s analysis of the issue to be the most enlightened. In *United States v. Paroutian*, *supra*, government agents twice executed unsuccessful, warrantless searches of appellant’s apartment in the absence of exigent or exceptional circumstances. Eventually, during a third—this time lawful—entry and search, the investigators found a secret compartment containing heroin. The circuit court of appeals reversed the trial judge’s denial of suppression of the heroin, for the government had not refuted the *prima facie* showing of a causal link between knowledge acquired during the two illegal searches and the discovery of the evidence. Noting that evidence actually derived from independent legal leads—from an “independent source,” *id.* at 489—was admissible, the court declined to extend the independent source rule into the realm of the “possible.”

[A] showing that the government had sufficient independent information available so that in the normal course of events it might have discovered the questioned evidence without an illegal search cannot excuse the illegality or cure tainted matter. Such a rule would relax the protection of the right of privacy in the very cases in which, by the government's own admission, there is no reason for an unlawful search. The better the government's case against an individual, the freer it would be to invade his privacy. We cannot accept such a result. The test must be one of actualities, not possibilities. [*Id.* at 489.]

The court, refusing to conjecture about what might have been, acknowledged that while the government might have found the evidence in a wholly legal fashion, "that is not what happened." *Id.*

We find *Paroutian, supra*, persuasive and reject the reasoning of cases involving similar factual patterns, such as *People v. Fitzpatrick, supra*, and *Commonwealth v. Garvin, supra*, which, in our judgment, find inevitable discovery too convenient a tool to chip away at Fourth Amendment guarantees.²¹ After thoroughly examining

²¹ For other cases which have espoused inevitable discovery principles to varying extents in a host of different circumstances, see *United States ex rel. Owens v. Twomey, supra*; *Government of the Virgin Islands v. Gereau*, 502 F.2d 914 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); *United States v. Falley*, 489 F.2d 33 (2d Cir. 1973); *United States v. Seohnlein*, 423 F.2d 1051 (4th Cir.), *cert. denied*, 399 U.S. 913 (1970); *Killough v. United States*, 119 U.S.App.D.C. 10, 336 F.2d 929 (1964); *Wayne v. United States*, 115 U.S.App.D.C. 235, 318 F.2d 205, *cert. denied*, 375 U.S. 860 (1963); *United States ex rel. Roberts v. Ternullo*, 407 F.Supp. 1172 (E.D.N.Y. 1976).

[Continued]

the case law and canvassing the pertinent legal literature, we have concluded that there are at least two substantial reasons militating against adoption in this jurisdiction of an inevitable-discovery exception based on speculation about routine police investigatory procedures.²²

²¹ [Continued]

For opinions which have repudiated the doctrine, see *United States v. Castellana*, 488 F.2d 65 (5th Cir.), *modified en banc*, 500 F.2d 325 (1974); *United States v. Falley, supra* at 42 (Oakes, J., concurring and dissenting); *United States v. Schipani*, 289 F.Supp. 43 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262 (2d Cir. 1969); *Killough v. United States*, 114 U.S.App.D.C. 305, 312, 315 F.2d 241, 248 (1962) (Wright, J., concurring); *Bynum v. United States*, 104 U.S.App.D.C. 368, 262 F.2d 465 (1958).

²² In addition to the inevitability of discovery premised on routine investigatory procedures, courts and commentators have accepted and rejected potential inevitability resulting from: imminent or ongoing investigations—saturation and otherwise, *Government of the Virgin Islands v. Gereau, supra*; *United States v. Falley, supra*; *United States v. Castellana, supra*; *United States ex rel. Roberts v. Ternullo, supra*. See also *United States v. Griffin*, 502 F.2d 959 (6th Cir.), *cert. denied*, 419 U.S. 1050 (1974); and "operation of law," *Wayne v. United States, supra* (coroner's required autopsy of dead body). See also HOFSTRA Note, *supra* at 156 *et seq.*; COLUM., *supra* at 91 *et seq.* There are other cases which have addressed inevitability concepts but defy rigid categorization. See, e.g., *Warren v. Territory of Hawaii*, 119 F.2d 936 (9th Cir. 1941). The rationales for rejecting inevitable discovery doctrine in the present case are equally applicable in these other situations, for the doctrine is exceedingly difficult to apply and is counterproductive from the deterrent standpoint.

There are at least two other recurring situations in the case law which may or may not actually implicate inevitable discovery principles and which are often mixtures of independent source, inevitability, and attenuation doctrines. First, there is the case of "dual actual causation"—i.e., both legal

First, the exception negates the deterrent purpose of the exclusionary rule. The deterrent effect of the suppression sanction is premised on the belief that the negative consequence (*i.e.*, suppression of evidence) flowing from official misbehavior will help correct the future behavior of the particular offending official as well as others involved in law enforcement. As a result, transgressions of the Fourth Amendment will be minimized. To the contrary, however, a hypothetical independent source, premised on "inevitable discovery," relieves the pressure to act constitutionally; it sanctions end runs and shortcuts; it severely weakens and arguably removes the intended exclusionary deterrent. It would allow the police illegally to arrest, detain, and photograph Keith Crews for an hour instead of following constitutional investigatory procedures that may—or may not—have yielded his correct identity, his photograph, and his positive identification by the victims. Indeed, such an approach would encourage officials to pursue an unlawful course, confident that after-the-fact recognition of the

and illegal sources are "contributing causes" (Maguire, *supra* at 311) to the chain which ultimately produces contestable evidence. One court has metaphorically termed this situation the case "of a tree nourished by both pure and polluted waters." *United States v. Schipani*, *supra*. See *James v. United States*, 135 U.S.App.D.C. 314, 418 1150 (1969). The other type of case often associated with inevitable discovery doctrine involves the very initiation of an investigation on the basis of illegal leads, with the eventual uncovering of evidence. See *United States v. Cole*, 463 F.2d 163 (2d Cir.), *cert. denied*, 409 U.S. 942 (1972); *United States v. Friedland*, *supra*.

Since ours would be a case of inevitable discovery allegedly resulting from "routine investigative procedures," we need not, and do not, confront the "dual origin" or "illegal initiation" issues. We have noted these concepts and representative cases to illustrate the difficulties encountered when the judiciary attempts to speculate on the matter of actual causation.

availability of a constitutional alternative would shield their wrongs.

Commentators have recognized the essential inconsistency between the inevitability doctrine and the exclusionary rule.

Judicial sanctioning of [the doctrine] can only encourage police shortcuts whenever evidence may be more readily obtained by illegal than by legal means. This, of course, is the opposite of the purpose of the exclusionary rule: to deter law enforcement officers from using illegal methods to procure evidence. Although the efficiency and effects of the exclusionary rule have come under increasing attack, as long as it is the accepted means of deterring official misconduct, judicial rules should be formulated to effectuate its intent. And the subverting effect that rules such as the inevitable discovery exception have on the exclusionary rule should be avoided. [COLUM., *supra* at 99-100 (footnotes omitted).]

See HOFSTRA Note, *supra* at 156 *et seq.*; Pitler, *supra* at 630; *but see* Maguire, *supra* at 317. Moreover, there is no lack of judicial opposition to the encroachment. The Third Circuit, for example, refused

the government's invitation to embrace [inevitable discovery because] . . . to admit unlawfully obtained evidence on the strength of some judge's speculation that it would have been discovered legally anyway would be to cripple the exclusionary rule as a deterrent to improper police conduct. [*United States v. Castellana*, *supra* at 68.]²³

²³ See also *United States v. Falley*, *supra* at 42-43 (Oakes, J., concurring and dissenting); *People v. Fitzpatrick*, *supra* at

In summary, the fundamental deterrent purpose of the exclusionary sanction, as developed in *Weeks*, *Silverthorne*, *Nardone*, *Wong Sun*, and even in the recent case law limiting the rule, cannot accommodate an inevitable-discovery exception.

The second reason for rejecting inevitable-discovery doctrine is the ambiguity, subjectivity, and consequent potential for abuse inherent in its application. It is too difficult—too speculative—to apply with confidence that the Fourth Amendment is not being compromised.²⁴

513, 300 N.E.2d at 146, 346 N.Y.S.2d at 803 (Wachtler, J., concurring); *Wayne v. United States*, *supra* at 244, 318 F.2d at 214 (Edgerton, J., dissenting).

²⁴ The dangerous, shortcut analysis permitted by inevitable discovery doctrine is exemplified by *Commonwealth v. Garvin*, 448 Pa. 258, 293 A.2d 33 (1972). The Pennsylvania Supreme Court, alluding to and relying in part on the inevitability of the defendant's eventual prosecution, refused to suppress a victim's in-court identification. The police had illegally arrested a robbery-burglary suspect on an informant's tip which did not satisfy the probable cause standards of *Spinelli v. United States*, 393 U.S. 410 (1969), and *Aguilar v. Texas*, 378 U.S. 108 (1964), and had taken him immediately to the scene of the crime and presented him to a victim, who identified him. Later both that victim and another positively identified the defendant at trial. The reasoning of the Pennsylvania court is not clear; it reflects the difficulties posed by the analytical mixture of exclusionary rule exceptions. After raising the possibility of attenuation resulting in a dissipated taint, the court begged the question by merely concluding that there was no reason to "employ the [exclusionary] sanction" when "the testimonial evidence did not derive from 'exploitation' of any illegality. . . ." *Garvin*, *supra* at 265-66, 293 A.2d at 37. The court implied that as long as the courtroom accusations of the witnesses were accurate and based on independent knowledge, they could not be Fourth Amendment fruits. According to the majority:

[Continued]

[A]llowing "poisoned" evidence in on the ground that some hypothetical police search would have uncovered the evidence anyway results in a speculative theory with no discernable limits.

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The "inevitable discovery doctrine is . . . ambiguous and . . . subject to abuse" [*People v. Fitzpatrick*, *supra* at 513-15, 300 N.E.2d at 146-47, 346 N.Y.S.2d at 803-04 (Wachtler, J., concurring).]

We perceive a serious potential for abuse not only by individuals whose task is to discover and prevent crime

²⁴ [Continued]

The illegal arrest in this instance merely provided the means for the confrontation with [the victim] more promptly than would otherwise have been the case We cannot assume that but for the illegal arrest the appellant would have remained at large indefinitely. [*Id.* at 266, 293 A.2d at 37-38 (footnote omitted).]

Although the court did not specifically address inevitable discovery doctrine and relied upon a combination of mingled rationales, the implication of the final quoted sentence is clear: the identification eventually would have been performed absent the illegality. As Justice Manderino concluded in dissent, the majority abandoned accepted Fourth Amendment analysis in favor of "speculation . . . that the 'illegally seized person' would not have remained at large indefinitely and the illegal arrest merely hastened the inevitable confrontation." *Id.* at 271, 293 A.2d at 40.

Even if the inevitable discovery exception were valid, the *Garvin* majority misapplied it. Its refusal to "assume that but for the illegal arrest the appellant would have remained at large indefinitely," *id.* at 266, 293 A.2d at 38, improperly put the burden on defendant to show that he would have remained free absent the illegal identification. It is widely recognized that the burden of "untainting" evidence by reference to any exclusionary rule exception is upon the government. See Part III.C., *supra*, and note 29, *infra*.

but also by prosecutors, whose "sophisticated argument" aided by hindsight [could] be used to show what the police would have done in a given situation." HOFSTRA Note, *supra* at 155. We decline to expose the safeguard of the Fourth Amendment to an "inevitable discovery" exception that undermines the Fourth Amendment exclusionary deterrent by reliance on conjecture. As the District of Columbia Circuit Court once admonished:

The important thing is that those administering the criminal law understand that they *must* do it [the legal] way. [*Bynum v. United States*, 104 U.S.App.D.C. 368, 372, 262 F.2d 465, 469 (1958) (emphasis added).]²⁵

It is important to stress, finally, that even if we were persuaded not to reject the doctrine of inevitable discovery altogether it could not properly be applied to the present setting. As noted earlier, by the terms of the accepted formulation of inevitability doctrine, the prosecution has the burden to show that the evidence would most certainly have been obtained by lawful means.²⁶

²⁵ The District of Columbia Circuit's position on inevitability doctrine is not clear. *Bynum*, *supra*, would appear to repudiate the doctrine. However, in both *Wayne v. United States*, *supra*, and *Killough v. United States*, 119 U.S.App.D.C. 10, 336 F.2d 929 (1964), both of which involved attempts to suppress illegally discovered bodies of murder victims, split divisions of the circuit court endorsed the doctrine. Because of their unique facts, and the additional fact that *Wayne's* inevitability resulted from "operation of law," we find these cases to be of limited precedential value, and certainly not indicative of the circuit's general acceptance of the theory. In any event, even if the D.C. Circuit had accepted the doctrine outright prior to 1971, this court, sitting en banc, is empowered to disagree. *M.A.P. v. Ryan*, D.C.App., 285 A.2d 310, 312 (1971).

²⁶ Maguire, *supra* at 317: "It must satisfy the court, as a fact, that the proffered evidence *would* have been acquired

In the special breed of cases in which the government contends that "routine investigative procedures" would lead to "inevitable discovery," the government must show that the procedure "is clearly routine and its results readily predictable." COLUM., *supra* at 93.

The prosecution must prove both that the procedure would have been used and that it would have actually turned up the questioned evidence. The prosecution does not satisfy this burden by mere speculation that such procedures would have been used and such results obtained. [*Id.* (footnotes omitted).]

The government has not persuaded us that based on an awareness of appellant's name, age, and description (the data which we assume was properly acquired; see *Terry v. Ohio*, 392 U.S. 1 (1968)) it definitely would have been able to obtain an initial photograph and an ultimate in-court identification. We are requested to speculate that the appellant's name, age, and description would, without doubt, have enabled the authorities to find appellant and photograph him (or obtain a recent photograph); that the witnesses would have continued to have the ability to identify appellant at the end of whatever time period it would have taken to obtain such a photograph; and that the officers actually would have pursued all the leads necessary. We decline. "Likelihood, even great likelihood, is not, of course, inevitability." COLUM., *supra* at 98. We cannot conclude with certainty that the evidence challenged here would have been inevitably discovered. Even were we not to reject

through lawful sources of information even if the illegal act had never taken place."

the inevitability doctrine as a general proposition, we could not approve its invocation here.²⁷

E. Attenuation Doctrine

Finally, our resolution of the question whether the courtroom identification of appellant Crews was obtained by "exploitation" of the "primary illegality" must deal with the most prominent of the exceptions to the exclusionary rule: attenuation. The government contends that the circumstances necessitate a holding that the taint of the illegal arrest had been adequately purged by the time the in-court identification took place. Appellant urges that this taint did not dissipate; it carried through to the courtroom identification.

As noted earlier, the attenuation principle, announced in *Nardone v. United States*, *supra*, was significantly developed by Justice Brennan's elaboration in *Wong Sun*, *supra*. Recently, in *Brown v. Illinois*, *supra*, the Supreme Court discussed even more thoroughly the dimensions, details, and proper application of "attenuation." There, the Court held that the inculpatory statements of a defendant arrested without probable cause or a warrant should be suppressed, even though preceded by *Miranda* warnings, since these warnings themselves did not provide sufficient attenuation to "purge the taint of an illegal arrest." *Brown*, *supra* at 605.

²⁷ At least one author urges the limited acceptance of inevitable discovery principles and their application in light of "the policies underlying the exclusionary rule." HOFSTRA Note, *supra* at 162. He would take into account variables such as the "good faith" of the officers. Because we find the theory of inevitable discovery inconsistent with the exclusionary rule, but also because we find the policy factors more appropriately discussed in the context of "attenuation," see *Brown v. Illinois*, *supra*, and not "causation," we reject this approach.

In the majority opinion, Justice Blackmun indicated that the key words in the *Wong Sun* formulation are found in the question whether the evidence has been developed "by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun*, *supra* at 488 (emphasis added). He stressed that this question of attenuation must be answered in each case consistent with the "considerations of deterrence and of judicial integrity" which undergird the exclusionary rule. *Brown*, *supra* at 599. See *Elkins v. United States*, quoted at note 11, *supra*. He then delineated and approved the pertinent variables developed by the lower courts in applying the *prge* principles of *Nardone* and *Wong Sun* to the secondary (derivative) fruits of Fourth Amendment illegality:

- (1) "[T]emporal proximity"; i.e., the amount of time between the illegality and the obtainment of the disputed evidence;
- (2) "[I]ntervening circumstances";
- (3) "[A]nd, particularly, the purpose and flagrancy of the official misconduct." *Id.* at 603-04.

The *Brown* opinion thus injected precision into the process of assessing attenuation. See *id.* at 606 (Powell, J., concurring). Too often courts had set out the facts of a case and merely concluded that on the whole attenuation appeared—i.e., the fruit had been unpoisoned—without a reasoned analysis of pertinent considerations. See, e.g., *Lockridge v. Superior Court*, 3 Cal.3d 166, 174, 474 P.2d 683, 688, 89 Cal. Rptr. 731, 736-37 (1970), *cert. denied*, 402 U.S. 910 (1971). Now, in light of *Brown*, it is clear that such conclusory decisions must be avoided in favor of concrete application of these three principal variables.²⁸

²⁸ At the outset of this discussion, it is important to note that the attenuation exception, unlike the independent source

1. Temporal Proximity

Time is to be factored into attenuation determinations. The *Brown* opinion adopts the view that the length of the time between the illegality and the obtaining of evidence has a direct bearing on whether exclusion of that evidence will deter future misconduct. The Supreme Court accepts the proposition that the potential impact of the exclusionary rule on law enforcement agents' behavior diminishes as the connection between the misconduct and the evidence is protracted over time. In other words, the prospect of exclusion far in the future does not provide as much disincentive for misdeeds in the present. See *United States v. Ceccolini*, *supra* at 1062.

In our case the government points to the time span between the January 9, 1974, arrest of Mr. Crews and the April 23, 1974, in-court identification as a basis for sufficient attenuation to avoid exclusion of the evidence. While this expanse may have some dissipating significance, it is obviously quite a brief period in the context of the criminal justice process. Moreover, there are two other reasons why this January-April time interval does not contribute very much to carrying the government's burden to demonstrate the purge.²⁹

First, while the initial arrest and the taking of the photograph did occur on January 9, 1974, the illegality in this case did not end on that date. The eventual re-

exception, applies only to secondary, *i.e.*, derivative, fruits, such as the identification testimony here at issue, and not to the initial, immediate products of an illegal search or seizure. A chain of one link cannot be attenuated.

²⁹ It is vital to bear in mind that the government bears the burden of proof of attenuation of the taint, *Brown*, *supra* at 605, as it does for all exceptions to exclusion. See Part III.C., *supra*.

arrest and confinement of Mr. Crews and his ultimate appearance at trial were all based on tainted facts (the government demonstrated no independent basis for re-arrest). Thus, the entire course of events was accomplished in violation of the Fourth Amendment. See Part III.B., *supra*. Since apparently there was no independent probable cause for official detention and the wrong thus continued, the time between initial arrest and ultimate procurement of evidence must be substantially discounted. See *United States ex rel. Gockley v. Myers*, 450 F.2d 232, 238 (3d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972).

Second, time is usually the least influential element of attenuation analysis. A contrary conclusion would place a substantial premium upon investigative and prosecutorial delay with an eye to dissipation. As will appear from the following sections, the presence or absence of significant intervening events and the character of the offending official behavior are more crucial determinants in the equation. The effect of a time lapse of any duration must be considered in light of the other two factors; otherwise, the deterrent rationale may be disserved.

2. Intervening Events

The prosecution points to a number of occurrences between the police impropriety and the production of the contested identification which allegedly dissipated the taint: (1) appellant's January 16, 1974, appearance in court and the resulting court-ordered lineup; (2) the February 22, 1974, grand jury indictment; (3) appellant's March 8, 1974, arraignment; and (4) his two pre-trial status hearing appearances on March 26 and April 5, 1974. We cannot conclude that any of these events was an effective attenuator. Nor were all taken together.

While there are no clear criteria against which to assess such interim occurrences, it is evident that to purge the taint the government must establish a "significant intervening event [which] altered the relationship established between petitioner and the officers by the illegal arrest." *Brown, supra* at 608 (Powell, J., concurring in part; emphasis added). The intervention of an event—even several "official" events as occurred here—will not be "significant" unless the tainted chain is severed. The event must be of a nature that forecloses the possibility of substantial deterrence from suppression; thus, it must preclude both the appearance and reality of gain from misconduct.³⁰ Only if there is a broken connection between the violation and the ultimate evidentiary profit can it be assumed that exclusion would not foster deterrence—that admission of the evidence would not encourage illegality.

Wong Sun itself involved the most frequently effective intervening event: an act of free will by an individual in giving a statement or other evidence to officials.

On the evidence that Wong Sun had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement, [the Court held] that the connection between the arrest and the statement had "become so attenuated as to dissipate the taint." *Nardone v. United States*, 308 U.S. 338, 341. [*Wong Sun, supra* at 491.]

The basis for finding a defendant's untainted exercise of free will—i.e., the voluntary choice to furnish evidence—to be a significant intervening event consonant with the deterrence policy was explicated by Justice Powell in *Brown v. Illinois, supra* at 610:

³⁰ This aspect of attenuation is analogous to independent source doctrine. See Part III.C., *supra*.

If an illegal arrest merely provides the occasion of initial contact between the police and the accused, and because of time or other intervening factors the accused's eventual statement is the product of his own reflection and free will, application of the exclusionary rule can serve little purpose: *the police normally will not make an illegal arrest in the hope of eventually obtaining such a truly volunteered statement.* [Emphasis added.]

See also *United States v. Scotten*, 428 F.Supp. 256 (D. Nev. 1976), *appeal dismissed*, 556 F.2d 590 (9th Cir. 1977). Thus, we conclude that an intervening event will not be "significant" for attenuation purposes unless it alters the relationship between the police and the accused in a way that precludes the police from perceiving a reward for taking illegal advantage of the accused. See discussion of *United States v. Ceccolini, supra*, in note 37, *infra*.

None of the attenuating events proffered by the government can serve to purge the taint in this case. Appellant's January 16 court appearance with the consequent court-ordered lineup, as well as his February 22 indictment, have superficial appeal in the sense that independent governmental authorities interposed their judgment that there was a basis for detaining and trying Mr. Crews. The fallacy of reliance upon the court's and the grand jury's decisions, however, lies in the obvious factual underpinning of those determinations: the tainted identifications made by the witnesses at the photo array sessions. The government cannot untaint identifications by conducting its own intervening events which themselves are flavored with the very same source of impropriety. The impermissible bootstrap effect is obvious.

The identical flaw also infects the arraignment and pre-trial status hearings. In addition, even if these hearings were not so affected, it is not at all apparent that they would constitute independent legal determinations sufficient to fracture the deterrent chain. It is difficult to perceive how an arraignment or a simple status hearing could "significantly alter the relationship" originated by official illegality. In any event, the government has not carried its burden in this regard; and it is not within our province to speculate about significant intervention.³¹

Finally, we perceive a critical distinction between this case and the one chiefly relied upon by the government, *Johnson v. Louisiana*, *supra*. In *Johnson*, the accused, alleging that "his nighttime arrest without a warrant was unlawful," *id.* at 365, challenged his subsequent identification at a lineup on Fourth Amendment grounds. The court, assuming invalidity of the arrest, held that the defendant's lineup identification could not be a poisoned fruit of that arrest because

[p]rior to the lineup . . . he had been brought before a committing magistrate to advise him of his rights and set bail. At the time of the

³¹ If Mr. Crews had returned to official custody of his own volition, any evidence developed as a result would have been purged of the primary taint. Like Wong Sun, appellant would have severed the legal connection between official misbehavior and the evidentiary harvest, for, as Justice Powell noted in *Brown*, *supra* at 610, the police are not presumed to anticipate "truly volunteered" evidence, and exclusion accordingly would "serve little purpose." The government, however, has pointed to no voluntary action by appellant in the chain of events here, and the "voluntary" identification by the witness cannot substitute. That identification most certainly was within the ambit of official anticipation. See the discussion of *United States v. Ceccolini*, *supra*, in Part III.E.3, *infra* and at note 37, *infra*.

lineup, the detention of the appellant was under the authority of this commitment. [*Id.*]

In *Johnson*, there could be no question of a taint attaching to a probable cause or other postarrest judicial determination, for prior to the arrest the government was lawfully aware that "the victim of an armed robbery had identified Johnson from photographs as having committed the crime." *Id.* at 358. Consequently, the defendant did not challenge the sufficiency of the factual predicate for arrest; instead he objected to the unexcused failure to obtain a warrant. This procedural failure, even if unconstitutional, could not have had a bearing on the magistrate's subsequent, independent determination of probable cause founded upon sufficient, untainted evidence possessed prior to the unlawful arrest. Because the magistrate's determination was not dependent upon information attributable to the unlawful arrest, that separate, neutral judicial event—which might have led to defendant's release absent reliable, prearrest identification evidence—"significantly altered the relationship" between the accused and the police. It broke any causal connection between the illegal arrest and the lineup identification.

As we have already noted, however, judicial intervention which itself is afflicted with the very infirmity it is supposed to prevent—*i.e.*, the taint of an arrest without probable cause—cannot serve the attenuating function of the independent magistrate's determination in *Johnson*. All the intervening events alleged by the government in this case were themselves tainted by Keith Crews' arrest. They could not supplant the illicit source; they could only reinforce it. Therefore, we hold that the courtroom identification of appellant was not purged of the taint by any significant intervening event. A contrary result, from the deterrent standpoint, would be counterproductive.

We turn now to the third and final variable in evaluating attenuation.

3. *The Nature and Character of the Fourth Amendment Violation*

The government argues that the actions of the police officers in arresting appellant, conveying him to headquarters, and then photographing him do not constitute a purposeful, let alone flagrant, Fourth Amendment violation. To the contrary, the government maintains that "an illegal arrest is the most that this record establishes." Because our reading of the relevant testimony does not square with this characterization, we cannot find a source of attenuation in the official conduct of this case.³²

³² When this appeal was before a division of this court, and again as part of the briefing and oral argument before the en banc court, the parties focused heavily on appellant's claim that the arrest here was a "sham" or a "pretext"—a purported arrest for truancy to cover the intention to arrest and obtain evidence for armed robbery and assault. Particular attention was devoted to the extreme case of *Edmons v. United States*, *supra* (FBI "dragnet arrest" of several individuals for selective service violations when the true purpose was to obtain identifications of assailants of fellow agents). See *Amador-Gonzalez v. United States*, 391 F.2d 308 (5th Cir. 1968); *Taglavore v. United States*, 291 F.2d 262 (9th Cir. 1961); *McKnight v. United States*, 87 U.S.App.D.C. 151, 183 F.2d 977 (1950). Courts are uniform in condemning this practice under the Fourth Amendment and invoking the exclusionary rule. "An arrest may not be used as a pretext to search for evidence." *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932). These cases can be said to comprise a "sham" or "pretext" arrest subspecies under the Fourth Amendment.

We do not believe it appropriate to classify this case under the sham-pretext line of authority. Although the officers who apprehended Mr. Crews may have had grounds for apprehending him as a potential truant, the fact is that they did not do so. The record does not reflect that appellant was informed he

Although "no mathematical weight can be assigned to any of the factors" bearing on attenuation, *United States v. Ceccolini*, *supra* at 1062, the character of the official impropriety is the most germane of the attenuating variables and is clearly the dispositive one in the balance struck here.³³ The majority opinion in *Brown v. Illinois*, *supra*, held "particularly [relevant] the purpose and fla-

was being detained and transported to headquarters as a suspected truant. To the contrary, he was told that he matched a robber's description. Further, although the officers stated that appellant was "processed" as a truant, it does not appear that the procedures followed in Mr. Crews' case conformed to the typical truancy practices also described by the officers. While there is some ambiguity and contradiction, the thrust of the testimony reveals that the photograph was taken for display to robbery victims; and the school was called to determine whether appellant was present on January 3 and 6, the dates of the robberies. It appears that the officers never even superficially pursued the truancy matter.

Accordingly, we believe that the official misconduct here—the arrest for armed robbery and assault without probable cause—is more suitably analyzed under traditional Fourth Amendment exclusionary rule criteria and thus, more particularly, as a factor bearing on attenuation. In summary, we do not order suppression of the evidence on the theory that the government engaged in a sham. Instead, we factor the degree of official misbehavior into the formula for determining whether the initial taint of illegality has dissipated.

³³ Recall that this factor is pertinent only when attenuation is at stake—i.e., when secondarily acquired, derivative evidence is challenged. See note 28, *supra*. If the evidence is an immediate product of an unlawful search and seizure, that evidence is automatically excludable; there is no room for a court to weigh admissibility based on the degree of misconduct. We join Justice Powell in concluding that suppression of immediately derived products, no matter what the nature of the source, is a "constraint . . . imposed by existing exclusionary-rule law." *Brown*, *supra* at 612.

grancy of the official misconduct," *id.* at 604, and Justice Powell's partial concurrence announced that "the point at which the taint can be said to be dissipated should be related, in the absence of other controlling circumstances, to the nature of the taint." *Id.* at 609 (emphasis added).³⁴

As with "temporal proximity" and "significant intervening events," the "nature of the conduct" attenuator has a sound foundation in the deterrent theory of the exclusionary rule, for the "basic purpose of the rule . . . is to remove possible motivations for illegal arrests." *Brown, supra* at 610 (Powell, J., concurring in part; emphasis added). It is presumed, and soundly so, that officials who have consciously chosen to tread upon Fourth Amendment protections are particularly aware of the connection between their conduct and the evidence produced. Thus, they will be especially susceptible to deterrence if deprived of the benefit of that evidence. As a consequence, when a Fourth Amendment violation has occurred, the government's burden to demonstrate attenuation is usually a heavy one; and the government's difficulty in doing so will increase in proportion to the offensiveness and purposiveness of the misconduct.

³⁴ The Second Circuit, in *United States v. Edmons, supra* at 584, pointedly acknowledged that the language chosen in *Wong Sun* strongly implies that the nature of the transgression plays a vital role in "fruit of the poisonous tree" assessments:

It has been well said of the statement by Professor Maguire endorsed in *Wong Sun* that "the sense of purposiveness and self-seeking of the term 'exploitation' is striking, and serves as a reminder that the exclusionary rule is a deterrent device." Ruffin, *Out on a Limb of the Poisonous Tree: The Tainted Witness*, 15 U.C.L.A. L. Rev. 32, 28 (1967). See also Pitler, *supra*, 56 Calif. L. Rev. at 588-89.

Both explicitly and implicitly, there is a widespread case law recognition of this point: the more flagrant the unconstitutionality, the less curable is the taint.³⁵ The majority opinion in *Brown v. Illinois, supra*, relied primarily on the fact that the

illegality . . . had a quality of purposefulness. The impropriety of the arrest was obvious The arrest, both in design and in execution, was *investigatory*. [*Id.* at 605 (emphasis added).]

Similarly, in *United States v. Edmons, supra*, the court found that the arrests at issue "violated the Fourth Amendment . . . because law enforcement officers . . . deliberately seized the appellants . . . for the purpose of displaying them to the agents who had been present at the scene of the crime." *Id.* at 583 (emphasis added). The court held that "in applying the exclusionary rule as a deterrent device, account should be taken of the degree of police misconduct." *Id.* at 585. Finally, the District of Columbia Circuit, in suppressing a confession and lineup identification testimony, leaned heavily upon the circumstance that "the manner in which [the defendant's] case was handled by the police clearly demonstrate[d] that it was one for investigation." *Gatlin v. United States, supra* at 128, 326 F.2d at 671 (1963) (emphasis added). The courts, therefore, have specifically condemned deliberate seizures for investigation.

The facts of this case bring it squarely under the authority of the controlling principles of these cases condemning the evidentiary fruits of investigatory arrests. One of the officers who initially detained appellant con-

³⁵ Indeed, even critics of the scope of the exclusionary rule acknowledge its utility in cases of intentional official misconduct. See *Michigan v. Tucker*, 417 U.S. 433, 447 (1974).

ceded that from the start the focus upon Keith Crews was initiated by suspicion of his involvement in the Washington Monument robberies. Indeed, the police told Mr. Crews straightaway, upon the initial stop, that he matched the culprit's description. Detective Ore, who was in charge of the robbery investigation, admitted that he was summoned to the scene to view a robbery suspect; that Mr. Crews was taken to the station and photographed because he matched the robber's description; that the ongoing intent was to display such photographs to the victims; and that they called appellant's school to discover whether he had attended on the days of the two robberies. The scenario which emerges from this testimony is unambiguous: appellant Crews was intentionally subjected to an investigatory arrest for the very purpose of obtaining identification evidence. *See* note 33, *supra*.

The remarkable parallels to the offending police activity in *Brown v. Illinois*, *supra*, are noteworthy. In that case, as in this,

[t]he impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was "for investigation" or for "questioning." . . . The detectives embarked upon this expedition for evidence in the hope that something might turn up. [*Id.* at 605 (footnote omitted).] ^[36]

³⁶ The severe constitutional perils inherent in "investigatory" seizures of citizens already had been described by the Supreme Court in *Davis v. Mississippi*, 394 U.S. 721 (1969):

Investigatory seizures would subject unlimited numbers of innocent persons to harassment and ignominy incident to involuntary detention. Nothing is more clear than that

Further, we agree with the authorities which have observed that the importance and necessity of suppressing evidence are substantially enhanced when the evidence unlawfully obtained is the specific goal the police set out to achieve:

When the police, not knowing the perpetrator's identity make an arrest in deliberate violation of the Fourth Amendment for the very purpose of exhibiting a person before a victim and *with a view toward having any resulting identification duplicated at trial*, the fulfillment of this objective is . . . an exploitation of "the primary illegality" The government "exploits" an unlawful arrest when it obtains a conviction on the basis of the very evidence . . . which it hoped to obtain by its unconstitutional act. [*Edmons*, *supra* at 584 (emphasis added).]

See also United States v. Bacall, 443 F.2d 1050 (9th Cir.), *cert. denied*, 404 U.S. 1004 (1971).

The present case, therefore, stands in marked contrast to the recent Supreme Court decision in *United States v. Ceccolini*, *supra*, relied upon by the dissenters.

the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions." [*Id.* at 726-27 (footnote omitted).]

It would not matter that the police did not engage in widespread arrests of all youths who fit the general description in this case. Actually, our inability to know whether or not there were others, or how many others were treated similarly to appellant, strengthens the argument for proscribing the known incident, for it is the unknown, innocent individuals whose rights can only be safeguarded by the deterrence achieved in cases such as this. *See Elkins v. United States*, *supra* at 217-18.

There, a uniformed police officer, taking a break from assisting at a school crossing, visited a friend at a flower shop where she was employed. He observed an envelope on the cash register with money sticking out of it. Upon opening it (apparently on impulse), he discovered policy slips. He asked his friend, the employee, to whom the envelope belonged, whereupon she gave the defendant's name. The officer reported the incident to detectives on the force who then informed the FBI. Four months later an FBI agent interviewed the employee. Over a year later defendant testified before a grand jury that he had never taken policy bets; thereafter, the flower shop employee testified to the contrary. Defendant was then indicted for perjury. At the perjury trial, the District Court suppressed the flower shop employee's testimony as the fruit of an illegal search of the envelope. The Second Circuit affirmed but the Supreme Court reversed on a finding of sufficient attenuation.

The evidence indicates overwhelmingly that the testimony given by the witness was an act of her own free will in no way coerced or even induced by official authority as a result of [Officer] Biro's discovery of the policy slips. Nor were the slips themselves used in questioning [witness] Hennessey. Substantial periods of time elapsed between the time of the illegal search and the initial contact with the witness, on the one hand, and between the latter and the testimony at trial on the other. While the particular knowledge to which Hennessey testified at trial can be logically tracked back to Biro's discovery of the policy slips, both the identity of Hennessey and her relationship with the respondent was [sic] well known to those investigating the case. There is, in addition, *not the slightest*

evidence to suggest that Biro entered the shop or picked up the envelope with the intent of finding tangible evidence bearing on an illicit gambling operation, much less any suggestion that he entered the shop and searched with the intent of finding a willing and knowledgeable witness to testify against respondent. Application of the exclusionary rule in this situation could not have the slightest deterrent effect on the behavior of an officer such as Biro. [Id. at 1062 (emphasis added).]

The court suggested that suppression of the evidence might have been warranted if "the search [had been] conducted by the police for the specific purpose of discovering potential witnesses," *id.* at 1060 n.4—a statement reaffirming the message of *Brown v. Illinois*, *supra*, that the evidentiary fruits of an unlawful investigatory arrest are not likely to survive suppression on the grounds of attenuation.³⁷

³⁷ *Ceccolini*, therefore, is distinguishable from the present case with reference to all three attenuation variables: (1) the official conduct was not flagrant; it did not reflect a purposeful search for evidence bearing on an illicit gambling operation; (2) the length of time between the officer's illegal search of the envelope and the witness's eventual testimony at trial was considerable; and (3) the witness' free will in *Ceccolini* (in contrast with the present case) was a significant intervening event.

More particularly, as to this last, "free will" variable, we note that in *Ceccolini* the witness was discovered as a result of the illegal search. Suppression of her testimony, however, would not have served the deterrent purpose of the exclusionary rule, for the policeman at the flower shop could not have perceived the eventual reward of that witness' testimony from his unlawful look inside the envelope. As the Court indicated in *Brown v. Illinois*, *supra* at 610, the rationale for recognizing a witness' free will as a significant attenuating variable

We believe that fidelity to the Constitution mandates our disapproval of the official misconduct which was designed to lead—and did lead—to the identification evidence in this case. We reject the notion that mere suppression of the photographic and lineup identification testimony, but not the in-court identification, would somehow be an adequate deterrent sanction in this case. This conclusion could only result from the untenable assumption that a sufficient disincentive results when the police are prohibited from enjoying some, but not all, of the products of their wrong.

Once we restore *any* profit to the unlawful search or seizure . . . we furnish an incentive

is that “the police normally will not make an illegal arrest [or search] in the hope of eventually obtaining such a truly volunteered statement.”

In *Ceccolini*, however, the Court “reject[ed] the Government’s suggestion that we adopt what would in practice amount to a *per se* rule that the testimony of a live witness should not be excluded from trial . . .” *Id.* at 1059. The present case is a clear example of why such a *per se* rule would compromise the Fourth Amendment. Here, the witness could never have volunteered an identification of Keith Crews of her own free will, absent the unlawful arrest and photograph. Her in-court identification was premised on this critical link to Mr. Crews illegally acquired by the police. Thus, in the present case, the significant result of the unlawful police activity was not discovery of the witness (who was already known and ready to testify); it was the tangible evidence that made her initial identification, as well as her eventual in-court identification, possible. The police had every reason to anticipate that if they could obtain a photograph of the assailant, by any means, identification by a ready witness would quickly follow. Accordingly, the free will of the witness in the present case does not represent an attenuating, intervening force. To the contrary, unless the exclusionary rule is applied in this case, an important deterrent would be relaxed; an incentive would be created for illegal arrests and searches in the hope of finding tangible evidence to facilitate identifications by known witnesses.

for law enforcement officials to engage in unconstitutional methods of law enforcement, and the danger of the use of such methods extends to the citizenry generally, including the innocent. In order for the exclusionary rule to be effective in deterring unconstitutional searches and seizures, it is not enough to remove *some* of the profit of such searches and seizures; *all* of the profit must be removed, for law enforcement officials, faced with a situation which permits any gain from the unlawful conduct, however remote, are furnished an incentive to violate the constitutional guarantees. [*Lockridge v. Superior Court*, *supra* at 173, 474 P.2d at 688, 89 Cal. Rptr. at 736 (Peters, J., dissenting; emphasis in original).]³⁸

In summary, we cannot find sufficient attenuation of serious taint created by the purposeful, unconstitutional

³⁸ We find critical distinctions between the cases cited in support of the government’s argument for dissipation and the present case. In *Bond v. United States*, D.C.App., 310 A.2d 221. (1973), this court concluded there was no indication that a photograph obtained in an allegedly illegal arrest in another matter “caused the police to concentrate attention upon [appellant] when trying to find the culprit in this case.” *Id.* at 225. Thus, any identification “fruit” utilized in the second case, *Bond*, was acquired “not [by] exploitation but [by] happenstance.” *Id.* Clearly, in *Bond* the time gap between original illegality and eventual “fruit,” the lack of relationship between the crime involved in the illegal arrest and the crime leading to the later arrest, conviction and appeal, and the evident lack of design or purpose by officialdom were influential in the court’s attenuation conclusion.

It is also clear that neither *Payne v. United States*, *supra* (analyzed and criticized in note 6, *supra*) nor *United States v. Reid*, 527 F.2d 380 (2d Cir. 1975) involved purposeful Fourth Amendment violations. See *id.* at 383 (court distinguished *Edmons* on this critical ground).

conduct of the law enforcement agents in this case. There was neither an expanse of time, nor a significant intervening event, nor a sufficiently innocuous violation of rights adequate to exempt the government from application of the exclusionary rule.³⁹

³⁹ Early in our discussion of the Fourth Amendment's exclusionary rule, we adverted to its dual purpose: deterrence and judicial integrity. See Part III.A. and note 11, *supra*. We have, nevertheless, relied solely on the deterrence rationale in progressing through the variety of purported justifications for admission of the contested in-court identification of appellant Crews. Although we therefore follow the Supreme Court view that deterrence is the "primary justification for the exclusionary rule," *Stone v. Powell, supra* at 485, we wish to stress that the "imperative of judicial integrity," *Elkins v. United States, supra* at 222, is an important factor in direct review of official constitutional violations. The more purposeful the official transgression, the greater is the reason for judicial refusal to sanction it. This is particularly true when—as in this case—the materialization of the evidence sought by the official misconduct is effected through the medium of trial. We believe that courts must be chary of becoming accomplices in the invasion of an individual's privacy. In this era of heightened public sensitivity to ethics in governmental affairs, the judiciary must still "resolutely set its face" against the "pernicious doctrine" that "the government may commit crimes in order to secure the conviction of a private criminal." *Olmstead v. United States*, 277 U.S. 438, 485 (Brandeis, J., dissenting). See also *United States v. Toscanino, supra* at 274. ("Society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law.")

We therefore rely secondarily upon the preservation of the integrity of our judicial system in ordering suppression of the courtroom identification of appellant. We accept judicial integrity as a still vital supplementary rationale whose cogency is closely related to that of deterrence in a given case.

IV. CONCLUSION

Essentially, this is a case concerning an unconstitutional investigatory arrest. Such police action recently has been condemned by the Supreme Court. See *Brown v. Illinois, supra* at 605. It will not be tolerated in the District of Columbia.

Reversed and remanded.

NEBEKER, Associate Judge, dissenting, with whom HARRIS, Associate Judge, joins: This case was decided correctly and for the right reasons by Judge Harris' earlier majority opinion for the division. *Crews v. United States*, D.C.App., 369 A.2d 1063 (1977). Since then what was arguably the subject of disagreement has been resolved by the recent decision of the Supreme Court in *United States v. Ceccolini*, — U.S. —, 98 S.Ct. 1054 (1978). It is earnestly to be hoped that the instant case will become the subject of further review where surely it may be disposed of on the authority of *Ceccolini* in the same manner used by the Court in deciding *Pennsylvania v. Mimms*, — U.S. —, 98 S.Ct. 330 (1977).

Stripped of its labored and burdened analysis, the majority opinion holds that an illegal arrest bars the government from producing at trial a victim who readily and willingly can identify the accused from observation and memory of the criminal event. The perpetual disability is imposed in the face of the inescapable fact that "the testimony given by the witness was an act of her own free will in no way coerced or even induced by official authority as a result of" the illegal arrest. *Ceccolini, supra* at —, 98 S.Ct. at 1062. Contrary to the assertion

of the majority, the official misconduct did not "lead . . . to the identification evidence in this case." Slip op. at 52. That evidence existed from the moment of the robbery and came directly and independently to the trial. At most, it was the government's ability to have the accused present at trial which "stems from" (slip op. at 24) the illegal arrest. No prior authoritative decision has carried the exclusionary rule over such a precipice of unacceptability.

[T]he remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book. [*United States v. Blue*, 384 U.S. 251, 255 (1966).]

Wisdom and the integrity of the judicial process cry out against this holding. Its cost to society, on balance, is too great. See *Ceccolini*, *supra* at —, 98 S.Ct. at 1060-61, citing *United States v. Calandra*, 414 U.S. 338, 348 (1974), *MCCORMICK ON EVIDENCE* § 71, at 150 (1954), and *Michigan v. Tucker*, 417 U.S. 433, 450-51 (1974). See also *Dickerson v. United States*, D.C.App., 296 A.2d 708 (1972) (Nebeker, J., concurring).

HARRIS, Associate Judge, dissenting: I shall not enlarge upon the views set forth in the original (but now vacated) majority opinion which affirmed appellant's conviction. *Crews v. United States*, D.C.App., 369 A.2d 1063 (1977). I do, however, assert my continued belief in their validity. I make but a few further observations.

A new student of the Fourth Amendment and the exclusionary rule which has been developed thereunder soon learns a number of truisms. Among them are: (1) there is an infinite variety of factual situations in search and seizure cases, with virtually no two ever being identical; (2) appellate courts have—withstanding the best of efforts and intentions—established a related body of law which regrettably is imprecise and frequently inconsistent; and (3) rational authority readily can be found both for and against the admissibility of challenged evidence in any questionable Fourth Amendment case.

The majority opinion, despite the obviously conscientious efforts of its able author to justify the result chosen by the majority, constitutes a legal smorgasbord of Fourth Amendment concepts. A large percentage of the factual situations and principles presented by the cases relied upon in the majority opinion readily may be distinguished from this case. In effect, the majority opinion fires an artillery shell at a target that calls for a marksman's rifle. With the majority opinion constituting 55 pages in length in slip opinion form, however, a detailed refutation thereof would be wholly infeasible.

In this case, in effect for want of a flashbulb, a convicted armed robber will evade justice. Suspicion was focusing upon appellant as the perpetrator of at least two assaultive thefts in the women's rest room at the Washington Monument. The detective in charge of investigating the offenses was summoned to the Monument grounds to see and photograph appellant, who had identified himself by name to other officers. Bad weather precluded acceptable photography, and appellant was taken to Park Police Headquarters. While there, he was photographed, an officer telephoned his school, and he was released.

To turn to the underlying proposition, the Fourth Amendment provides in pertinent part: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated" Despite the suspicions which justified the investigative intrusion on appellant's wanderings at the Monument grounds that day, *see, e.g., Terry v. Ohio*, 392 U.S. 1 (1968), there is no question but that there then was no probable cause for his seizure. Thus, his Fourth Amendment rights were violated. If any incriminating evidence had resulted from a search of appellant during his one-hour detention, assuredly it properly would have been suppressed as evidence. However, no evidence was seized; only appellant was. The majority thus initially faced an intractable dilemma: Appellant could not be suppressed. *See, e.g., Bond v. United States*, D.C.App., 310 A.2d 221, 224-25 (1973). The trial court did suppress evidence of the photographic and lineup identifications of appellant which later were made.¹ Thus, the majority was left with only one remaining avenue of ordaining an adverse legal consequence to its disapproval of the conduct of the police: Suppress the testimony of the victim of the armed robbery, who had nothing to do with the improper detention and whose independent ability to identify her assailant was wholly unaffected thereby.²

¹ Having properly learned appellant's identity through their initial inquiry on the Monument grounds, the police readily could have photographed him at a later time in a number of permissible ways.

² The dissent to the original majority opinion had as its basic theme the apparent belief that appellant's unwarranted investigative detention was a sham arrest. The current majority opinion affirmatively disavows the existence of a sham arrest. Additionally, it is noteworthy that the new majority opinion does not even hint (nor could it) that the victim's ability to identify her assailant resulted from any improper suggestivity.

The majority opinion is disingenuous in various respects. Illustrative of this is footnote 7 of the majority opinion. After citing (and quoting from) a case which is contrary to the majority's position, the majority seeks to distinguish it by stating: "Appellant receives no immunity by virtue of our decision in this case." In a hypertechnical, semantic sense, it might be arguable that "immunity" is not what the majority confers upon appellant. But as a practical matter, inescapably that is precisely what the majority does. If there were any valid authority or plausible rationale for the majority's ruling, it would not be necessary for the majority to lead us through such a misty Fourth Amendment wonderland. Stripped of its often anfractuous reasoning, the majority opinion reaches an extraordinary and unprecedented result. The innocent victim of a crime, whose independent ability to identify her assailant has been and remains undeniable, is to be deprived of her day in court because the constable blundered in a way which did not lead to the discovery or seizure of any evidence which was admitted at appellant's trial.

In *United States v. Ceccolini*, 98 S.Ct. 1054 (1978), an unconstitutional search ultimately led to the use of uncoerced testimony by an independent witness. The defendant sought to suppress that testimony. The Supreme Court held that the testimony was admissible, stating in part:

The cost of permanently silencing [the witness] is too great for an even-handed system of law enforcement to bear in order to secure . . . a speculative and very likely negligible deterrent effect.⁽³⁾ [*Id.*, at 1062.]

³ In *Ceccolini*, the Court specifically reaffirmed what it said more than 50 years ago in *McGuire v. United States*, 273 U.S. 95, 99 (1927):

[Continued]

Today, this court does not silence a disinterested witness whose testimony was indeed a consequence of an unconstitutional search (a result which the Supreme Court refused to sanction in *Ceccolini*), but rather permanently silences the victim of a crime whose ability to testify was unrelated in any way to the unconstitutional seizure of appellant. I join my Brother NEBEKER in expressing the hope that the only remaining reviewing authority will both have and seize the opportunity to reject the majority's manifestly unwarranted extension of the exclusionary rule.

I am authorized to state that *Associate Judge* NEBEKER shares these views.

³ [Continued]

A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule. [95 S.Ct. at 1061.]

APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS

JANUARY TERM, 1978

No. 8507

CR 10258-74-A

KEITH CREWS, APPELLANT

v.

UNITED STATES, APPELLEE

Appeal from the Superior Court of the
District of Columbia
Criminal Division

BEFORE: NEWMAN, Chief Judge, and KELLY, KERN,
GALLAGHER, NEBEKER, YEAGLEY, HARRIS,
MACK and FERREN, Associate Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the Superior Court of the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of conviction on appeal herein is reversed and this cause is remanded to the trial court for fur-

ther proceedings consistent with the opinion filed this date.

PER CURIAM
For the Court:

/s/ Alexander L. Stevas
ALEXANDER L. STEVAS
Clerk of the Court

Dated: June 14, 1978

Opinion for the Court by Associate Judge Ferren, with whom Chief Judge Newman, and Associate Judges Kelly, Kern, Gallagher, Yeagley and Mack, concur.

Dissenting opinion by Associate Judge Nebeker, with whom Associate Judge Harris concurs.

Dissenting opinion by Associate Judge Harris, with whom Associate Judge Nebeker concurs.

A TRUE COPY.

TEST:

ALEXANDER L. STEVAS
Clerk of the District of Columbia
Court of Appeals

By /s/ Mary K. Whittaker
Deputy Clerk

APPENDIX C

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 8507

KEITH CREWS, APPELLANT,

v.

UNITED STATES, APPELLEE.

Appeal from the Superior Court of the
District of Columbia

(Argued July 16, 1975 Decided February 16, 1977)

W. Gary Kohlman, Public Defender Service, for appellant. *Frederick H. Weisberg*, Public Defender Service, also entered an appearance on behalf of appellant.

John W. Polk, Assistant United States Attorney, with whom *Earl J. Silbert*, United States Attorney, and *John A. Terry*, *Stuart M. Gerson*, and *Harry R. Benner*, Assistant United States Attorneys, were on the brief, for appellee.

Before FICKLING, NEBEKER, and HARRIS, Associate Judges.

Opinion for the Court by Associate Judge HARRIS.

Dissenting opinion by Associate Judge FICKLING at p. 20.

HARRIS, Associate Judge: Appellant challenges his conviction of armed robbery (D.C. Code 1973, §§ 22-2901

and -3202) on the grounds that his in-court identification was the "fruit" of an illegal arrest, which hence should have been excluded as evidence. We affirm.

I

On the morning of January 3, 1974, a woman was robbed at gunpoint in the ladies' restroom on the grounds of the Washington Monument. Her assailant, peering through the crack between the door and the side of the stall that she occupied, requested admission and demanded \$10. She refused, whereupon he pointed a pistol at her and repeated his demands. She gave him \$10, but he insisted that she open the stall door. When she did so, the gunman made sexual advances, including touching her breasts and asking her to perform fellatio. She resisted and pleaded with him to leave, which he finally did.

A similar incident occurred on the afternoon of January 6. In the same restroom, two other women were forced to surrender \$20 to a youth who was wielding a broken bottle. All three victims described their assailant to the police as a 15-to-18-year-old Negro male of slender build and light complexion.

Three days later, Officers Rayfield and Barg of the United States Park Police observed appellant in the vicinity of the Monument. They stopped him and asked his name and age. He gave his name and his age, which was 16.¹ The officers asked why he was not in school, and said that he bore a likeness to the descriptions given

¹ Appellant was prosecuted as an adult pursuant to D.C. Code 1973, § 16-2301(3)(A). He was sentenced to four years' probation under the Youth Corrections Act. 18 U.S.C. § 5010(a) (1970).

by the robbery victims. Appellant replied that he had just "walked away from school", and the officers allowed him to go on his way. They then asked James Dickens, a tour guide who believed that he had seen the assailant of the first victim on January 3, if appellant looked familiar. Dickens responded that he thought appellant had been in the area that day. The Park Police officers stopped appellant a second time and summoned Detective Ore, the Metropolitan Police officer in charge of the robbery investigation. The detective arrived a few minutes later and attempted to take a picture of appellant to show to the robbery victims. When it was realized that inclement weather precluded acceptable photography, Detective Ore took appellant into custody as a suspected truant and transported him to Park Police Headquarters. He was detained there for approximately one hour, during which time the detective telephoned appellant's school, and the youth was photographed and interviewed.² Appellant then was released.

On the following day, the first victim was shown an array of eight photographs, including that of appellant. Although previously she had selected no suspect after viewing several hundred mugshots, she immediately identified appellant as her assailant. One of the other

² D.C. Code 1973, § 31-201 requires school attendance by all children between the ages of seven and 16. The officers testified that they had not placed appellant under arrest but had merely followed standard procedures for truancy cases. There was conflict between the testimony of appellant and that of the officers as to whether at the time he was stopped appellant offered any identification to substantiate his claim that he was sixteen and thus, by definition, not a truant. Cf. *Bates v. United States*, D.C.App., 327 A.2d 542, 543 & n.2 (1974) (on appeal from a conviction, the evidence is to be viewed in the light most favorable to the government).

two victims made a similar identification of appellant from the photographs. Later, the first victim again identified appellant at a lineup.

Appellant filed a pretrial motion to suppress all identification testimony, contending that his detention for truancy had been a pretext to seek evidence for the robbery investigation, and that being the product of his illegal detention, the identification testimony was inadmissible. Following extensive testimony by appellant, the three victims, and Officer Rayfield and Detective Ore, the trial court found that the second detention constituted an arrest, and that as such it was defective for lack of probable cause. The court ruled that the photographic and lineup identifications would be excluded. However, on the grounds that the victims' ability to identify the robber (based on their face-to-face encounters with their assailant) was unaffected by the police conduct, it concluded that in-court identifications should be permitted. The jury convicted appellant of the armed robbery of the first victim, but found him not guilty of all other charges.³ Appellant now contends that the trial court erred in permitting the in-court identifications.

II

Appellant's challenge to the identification testimony by the three women rests upon the "fruit of the poisonous tree" doctrine developed in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), *Wong Sun v. United*

³ In addition to the charge of armed robbery upon which appellant was convicted, the indictment included another count of armed robbery, two counts of robbery, one count of attempted armed robbery, and three counts of assault with a dangerous weapon. D.C. Code 1973, §§ 22-2901, -3202; 22-2901; 22-2901, -3202, and 22-502.

States, 371 U.S. 471 (1963), and their progeny. He contends that the in-court identifications were the result or "fruit" of an illegal arrest and detention, and therefore were inadmissible. We reject both his premise and his conclusion.

In *Wong Sun*, the Supreme Court held that in certain circumstances, evidence which the government has acquired either directly or indirectly as a result of a violation of an accused's Fourth Amendment rights may not be used to secure his conviction. See *Mapp v. Ohio*, 367 U.S. 643 (1961); *Silverthorne Lumber Co. v. United States*, *supra*; *Weeks v. United States*, 232 U.S. 383 (1914). While the principle applies to testimonial as well as to tangible evidence [*Wong Sun v. United States*, *supra*, at 485-86; see also *Bond v. United States*, D.C. App., 310 A.2d 221, 224-25 (1973)], the *Wong Sun* Court emphasized that the reach of the exclusionary rule is not unlimited (371 U.S. at 487-88):

We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting the establishment of the primary illegality, the evidence to which instant objection is made had been come at by exploitation of that illegality or instead by a means sufficiently distinguishable to be purged of the primary taint." Maguire, *Evidence of Guilt*, 221 (1959).

Cf. United States v. Wade, 388 U.S. 218, 240-41 (1967); see also *Nardone v. United States*, 308 U.S. 338, 340-41 (1939). Accepting the trial court's finding that appellant's detention constituted an arrest for which the police lacked probable cause, the question for our deter-

mination is whether the in-court identification testimony by the robbery victims properly may be characterized as evidence which resulted from an impermissible "exploitation" of that arrest. We conclude that it may not.

The challenged identifications rested upon the concurrence of (1) the ability of the witnesses to render such evidence (*i.e.*, the knowledge upon which their testimony was based), and (2) the opportunity for the presentation of the incriminating testimony (*i.e.*, the presence of both the witnesses and the accused in the trial). A witness' testimony may be held inadmissible when it rests upon knowledge or recollections of the underlying transaction which have been provided or significantly supplemented by improper police activity. *Cf. United States v. Wade, supra*, at 239-40; *People v. Stoner*, 65 Cal.2d 545, 422 P.2d 585, 589, 55 Cal.Rptr. 897, 901 (1967). Here, however, there was no such fatal infection. *Cf. Pender v. United States*, D.C.App., 310 A.2d 252 (1973). The trial court ruled that the identification testimony rested upon the independent basis of the victims' face-to-face encounters with their assailant, and we find its conclusion amply supported by the record.⁴ See D.C. Code 1973, § 17-305(a).

⁴ Appellant contends that the trial court erred "as a matter of law" in applying an "independent basis" test to the proffered testimony. We disagree. As the Seventh Circuit recognized in *United States ex rel. Owens v. Twomey*, 508 F.2d 858, 865 (7th Cir. 1974), whether the disputed evidence falls within the principle of *Wong Sun* may be answered by any one of three general tests: "independent source", "attenuated basis", or "inevitable discovery". While it is true that the concern underlying these exceptions to the *Wong Sun* doctrine [*i.e.*, the need for and possibility of deterring improper government activity, see *Brown v. Illinois*, 422 U.S. 590, 608-12 (1975) (POWELL, J., concurring in part)] differs from that at the bottom of the "independent basis"

While appellant correctly observes that the poisonous tree doctrine is not confined to the direct "fruits" of police misconduct (*e.g.*, tangible items improperly seized, or a confession obtained during an illegal detention), it does not follow that, simply because his arrest ultimately was followed by his in-court identification by the three women, there was a sufficient relationship between the two events to warrant application of the exclusionary rule. The *Wong Sun* Court expressly declined to adopt a "but for" test as the appropriate analytical mode (371 U.S. at 487-88), and subsequent case law uniformly has demanded more than a superficial demonstration of a causal chain between the improper act and the disputed evidence. See, *e.g.*, *State v. Miranda*, 104 Ariz. 174, 450 P.2d 364 (1969) (en banc); *People v. McInnis*, 6 Cal. 3d 821, 494 P.2d 690, 100 Cal.Reptr. 618 (en banc), cert. denied, 409 U.S. 1061 (1972); *People v. Pettis*, 12 Ill.App.3d 123, 298 N.E.2d 372, 375 (1973). It is true, however, that a sufficient connection may be found where the breach of the accused's constitutional rights provided the government with what might be called the "opportunity for incrimination" by revealing the identity

test embraced in *United States v. Wade, supra* (*i.e.*, the impact of such misconduct on the reliability of the evidence), the doctrines share a common analytical approach. See *United States v. Wade, supra*, at 241. Whether the question is that of reliability or deterrent potential, the pertinent inquiry is the relationship or proximity of the challenged government activity to the proffered evidence. The greater the "independence" of the evidence from such activity, the less likely it is that its reliability has been impaired thereby, and the less likely that suppression under *Wong Sun* will yield the desired deterrence. See *Brown v. Illinois, supra*, at 608-12 (POWELL, J., concurring in part); see also *Clemons v. United States*, 133 U.S.App.D.C. 27, 408 F.2d 1230 (1968) (en banc), cert. denied, 394 U.S. 964 (1969); *United States ex rel. Pella v. Reid*, 527 F.2d 380, 382-83 (2d Cir. 1975).

of a crucial witness [see, e.g., *Smith v. United States*, 120 U.S.App.D.C. 160, 344 F.2d 545 (1965); *Abbott v. United States*, D.C.Mun.App., 138 A.2d 485 (1958)], or, in some cases, by revealing the fact of the offense itself. See, e.g., *United States v. Schipani*, 289 F. Supp. 43, 61-63 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262 (2d Cir. 1969), *cert. denied*, 397 U.S. 922 (1970). Appellant apparently seeks an expansion of the *Wong Sun* doctrine in this direction. He posits that absent his arrest and detention, his identity would have remained unknown and there would have been no opportunity for the in-court identifications.⁶ Essentially, he argues that he was the "fruit" of the police misconduct. We find this theory unacceptable.

⁶ Even under the less rigorous causal analysis of the "but for" test, appellant's argument is implausible, for it requires the assumption that absent the improper detention the police never would have been able to ascertain the identity of the robber. The record reveals that before the disputed arrest the officers' attention already had focused on appellant, and that they had learned his identity at the time of the first stop, the validity of which has not been challenged. We are unwilling to suppose that had there been no second stop the police would have failed to pursue such positive leads to their ultimate conclusion. Cf. *Gissendanner v. Wainwright*, 482 F.2d 1293, 1297 (5th Cir. 1973). We agree with the views of the Pennsylvania Supreme Court expressed in *Commonwealth v. Garvin*, 448 Pa. 258, 264, 293 A.2d 33, 37 (1972):

Although we agree with appellant as to the illegality of the arrest we must disagree with his conclusion that the identifications must be suppressed. No law abiding society could tolerate a presumption that but for the illegal arrest the suspect would never [be] required to face his accusers. Thus, we conclude that the only effect of the illegal arrest was to hasten the inevitable confrontation and not to influence its outcome.

We rejected a similar argument in *Bond v. United States*, *supra*, where it was asserted that the police had focused their investigation of a confidence game on the defendant as a result of a photograph obtained during what was alleged to have been a pretextual arrest for a traffic violation. While we concluded that the traffic arrest had resulted in no such focus, and hence there had been no "exploitation" of the alleged misconduct, we expressed doubt that the *Wong Sun* doctrine reached the essentially nonevidentiary circumstance of the accused's later presence in the courtroom (310 A.2d at 224-25):

Even assuming the illegality of the prior arrest, we regard [appellant's] position as untenable. In the first place, he points to no particular "fruit" of this alleged "poisonous tree" which was introduced into evidence against him. This doctrine does not operate so broadly as to bar all subsequent prosecutions. Rather it operates on particular evidence, either tangible or testimonial, and, if properly invoked, causes the exclusion only of such evidence. See *Wong Sun v. United States*, [*supra*]. Here, it would seem that appellant would have us hold that he himself is the "fruit" and accordingly he should have been excluded but "[w]e have ruled on more than one occasion that a court will not inquire into the manner in which an accused is brought before it, and that the legality or illegality of an arrest is material only on the question of suppressing evidence obtained by the arrest." [Quoting *District of Columbia v. Jordan*, D.C.App., 232 A.2d 298, 299 (1967).]

See *District of Columbia v. Perry*, D.C.App., 215 A.2d 845, 847 (1966); *Boucher v. Warden*, 5 Md.App. 51, 245 A.2d 420, 423-24 (1968). Cf. *M.A.P. v. Ryan*, D.C.App.,

285 A.2d 310, 315 (1971). Our conclusion rested upon the well-established principle that, given a fair trial, the fact of an illegal arrest will not vitiate a conviction. *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886). While it is true, as appellant notes, that the *Ker-Frisbie* doctrine has been the subject of some criticism [see, e.g., *United States v. Toscanino*, 500 F.2d 267, rehearing en banc denied, 504 F.2d 1380 (2d Cir. 1974); *United States v. Edmons*, 432 F.2d 577, 583 (2d Cir. 1970)], we have no doubt as to its continued validity. See *Stone v. Powell*, 96 S.Ct. 3037, 3047 (1976); *Gersten v. Pugh*, 420 U.S. 103, 119 (1975); *Stevenson v. Mathews*, 529 F.2d 61, 63 (7th Cir.), cert. denied, 96 S.Ct. 3181 (1976).

In *Payne v. United States*, 111 U.S.App.D.C. 94, 294 F.2d 723, cert. denied, 368 U.S. 883 (1961), the United States Court of Appeals sustained, by analogy to *Frisbie*, the admission of eyewitness testimony given pursuant to a confrontation which occurred during an unlawful detention. It approved, however, the exclusion of the defendant's statement which had been made during the period of illegal custody. To support its rulings, the court relied in part upon the two *Bynum* decisions, 104 U.S.App.D.C. 368, 262 F.2d 465 (1958), appeal after retrial, 107 U.S.App.D.C. 109, 274 F.2d 767 (1960). In *Bynum I*, the court ordered the suppression of fingerprints obtained following an illegal arrest. *Accord*, *Mills v. Wainwright*, 415 F.2d 787 (5th Cir. 1969); see *Davis v. Mississippi*, 394 U.S. 721 (1969). At *Bynum's* second trial, the government introduced in evidence an older set of fingerprints unrelated to the unlawful arrest, and the second conviction was affirmed. We also note that the Supreme Court in *United States v. Wade*, supra, cited *Wong Sun's* attenuation-of-taint analysis as support for its independent source rule. 388 U.S. at 241, citing 371

U.S. at 488. We conclude that the poisonous fruit doctrine does not reach so far as to exclude identification testimony connected with an illegal arrest if, as here, there is an adequate independent source for the evidence. See *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972); *Stevenson v. Mathews*, supra; *State v. Miranda*, supra, 450 P.2d at 371-72.

III

Even if we were to agree with appellant that his in-court identification by the three women was causally related to his unlawful arrest in the sense contemplated by the *Wong Sun* doctrine, our conclusion as to the admissibility of such evidence would be unchanged. The Supreme Court has emphasized that the judicially-created exclusionary rule is not aimed at redressing the harm to an individual whose constitutional rights have been invaded, but rather seeks by its deterrent effect to preserve to the whole of society the interests secured by the Fourth Amendment.⁶ See *Stone v. Powell*, 96 S.Ct. 3037

⁶ In addition to citing the objective of deterrence, the Court in *Mapp v. Ohio*, supra, also recognized the need to preserve what later was described as the "imperative of judicial integrity." See *United States v. Peltier*, 422 U.S. 531, 536-39 (1975). However, recent decisions have focused primarily on the question of deterrence. In *Stone v. Powell*, 96 S.Ct. 3037, 3047 (1976), the Court observed:

While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence. [Footnote omitted.]

See *Michigan v. Tucker*, 417 U.S. 433, 446-47 (1974); *United States v. Peltier*, supra.

On the facts before us there is no question of the probative value of the disputed identification testimony. Moreover, to deny the victim of a crime the opportunity to place his or her accusation against the wrongdoer before a court of law, sim-

(1976); *United States v. Calandra*, 414 U.S. 338, 347-48 (1974). As an adjunct of the exclusionary principles embraced in *Mapp v. Ohio*, *supra*, the fruit of the poisonous tree doctrine does not mandate the automatic exclusion of all evidence which may be linked (however tenuously) to police misconduct. See *Stone v. Powell*, *supra*, at 3048. Rather, the appropriate inquiry involves an examination of the circumstances of the particular case to determine both the need for and the likelihood of deterrence of the misconduct in question should the penalty of exclusion be imposed.' As expressed by the Fifth Circuit:

Evidence should be excluded only where the benefit accruing to society from the additional

ply because it is determined retrospectively that the defendant was arrested illegally, strikes us as an unacceptable perversion of the notion of judicial integrity.

'The exclusionary rule has come under increasingly sharp criticism, both for its social costs and for its limited efficacy in achieving the avowed purpose of deterrence. See *Brown v. Illinois*, *supra* note 4, at 600 n.5. In *Stone v. Powell*, *supra*, the Court observed (96 S.Ct. at 3050):

Application of the rule . . . deflects the truth-finding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice. [Footnotes omitted.]

See also *Stone v. Powell*, *supra*, at 3052-55 (BURGER, C.J., concurring).

deterrent against unlawful police practices equals or exceeds the detriment to society caused by the release of criminals. [*United States v. Houltin*, 525 F.2d 943, 947 (5th Cir. 1976). See *Stone v. Powell*, *supra*, at 3047-49; *United States v. Calandra*, *supra*, at 348; see also *Brown v. Illinois*, 422 U.S. 590, 608-12 (1975) (POWELL, J., concurring in part)].

In the case before us, the police misconduct consisted of arresting and detaining appellant for approximately one hour on the basis of information which fell short of constituting probable cause with respect to the robberies. We do not suggest that the episode amounted to an insignificant invasion of appellant's constitutionally protected interests. However, it is well settled that while a subsequent determination that the original arrest was made without probable cause may give rise to the exclusion of incriminating evidence resulting from the arrest, it does not provide the arrested individual with immunity from prosecution for the transaction in question. See, e.g., *Bond v. United States*, *supra*, at 224-25; *Gissendanner v. Wainwright*, 482 F.2d 1293 (5th Cir. 1973); *United States v. Friedland*, 441 F.2d 855, 861 (2d Cir.), *cert. denied*, 404 U.S. 867 (1971). While the trial court concluded that the officers did not have probable cause to detain appellant, their suspicions as to his involvement in the robberies and his possible truancy were soundly based [*cf. Beck v. Ohio*, 379 U.S. 89 (1964); *Johnson v. United States*, D.C.App., 349 A.2d 458 (1975); *Stephenson v. United States*, D.C.App., 296 A.2d 606 (1972), *cert. denied*, 411 U.S. 907 (1973)], and he was released soon after he had been photographed and it was determined that he was not a truant.* Cf.

* In *Davis v. Mississippi*, *supra*, the Supreme Court barred the use of fingerprints obtained during an illegal detention

Gatlin v. United States, 117 U.S.App.D.C. 123, 128, 326 F.2d 666, 670-71 (1963); *Wise v. Murphy*, D.C. App., 275 A.2d 205 (1971) (en banc). Without more, the incident reflects good faith misjudgment on the part of the officers, scarcely warranting the severe result urged by appellant." See *United States ex rel. Peile v. Reid*, 527 F.2d 380 (2d Cir. 1975).

Appellant's principal thrust, however, is that the gravity of the error committed by the police officers was compounded by the fact that while he was detained ostensibly for truancy, the true purpose of his detention was to gain information for the robbery investigation. At the suppression hearing, Officer Ray and Detective Ore testified that they had followed the routine procedure for truancy cases, but they acknowledged that their principal interest was in the more serious charges. We recognize that where the arrest is no more than a sham to circumvent the safeguards of the Fourth Amendment, some courts have sought to deter such misconduct by barring in-court identification testimony as well as the

(as part of a general dragnet operation). The Court was careful to point out: "We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest." 394 U.S. at 728.

⁹ As the Supreme Court noted in *Michigan v. Tucker*, *supra* note 6, at 446: "Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose."

more direct fruits of the constitutional violation. Cf. *United States v. Edmons*, *supra*; *United States ex rel. Pella v. Reid*, *supra*.¹⁰ See also *Taglavore v. United States*, 291 F.2d 262 (9th Cir. 1961); *Blazak v. Eyman*, 339 F. Supp. 40 (D.Ariz. 1971); cf. *People v. Dibble*, 46 App.Div.2d 829, 361 N.Y.S.2d 77, 80 (1974). However, the mere fact that by arresting an individual on one charge the officers gain an opportunity to advance their investigation of another offense does not mandate the imposition of evidentiary sanctions. In a case in which the police suspect that an individual has violated two laws, one for which they have probable cause to arrest and one for which they do not, it would be absurd to suggest that they must forego enforcement of the former simply because their primary interest is in the latter.

Appellant's reliance on *United States v. Edmons*, *supra*, is misplaced. There, more than 50 FBI agents swept a neighborhood in an effort to locate individuals who had assaulted and interfered with other agents who had been attempting to execute an arrest warrant. The officers knew only that the suspects were "young and black", and were instructed to round up such persons on the charge of failure to have their selective service cards in their possession, in the hope that the victims of the assault would be able to pick out their assailants. *Id.* at 580-81. Cf. *Sullivan v. Murphy*, 156 U.S.App.D.C.

¹⁰ In *Pella* the Second Circuit rejected an argument that its earlier decision in *Edmons* required the exclusion of the in-court identification of an individual who had been arrested without probable cause. It reasoned that the testimony rested on the independent basis of the witness' first-hand observations of the crime, and distinguished *Edmons* on the basis that *Pella* had not been arrested as part of a dragnet or upon a deliberately false pretense. 527 F.2d at 382-83.

28, 59-60, 478 F.2d 938, 969-70, *cert. denied*, 414 U.S. 880 (1973). Five men were arrested on the pretext,¹¹ and four were identified and subsequently convicted. The trial court found their arrests to have been illegal, but concluded that the in-court identification testimony rested upon the independent bases of the agents' observations at the time of the assaults. The Second Circuit did not disturb this conclusion (*see* 432 F.2d at 582-83), but, concerned with the gravity of the agents' misconduct, reasoned that the illegal arrests had been the "necessary cause" of such testimony and concluded that the deterrent principles of *Wong Sun* required that the indictments be dismissed.¹²

The case before us is readily distinguishable. Here there was no dragnet. Appellant's arrest was not the result of a random or indiscriminate roundup of possible suspects. *See Ellis v. United States*, 105 U.S.App.D.C. 86, 264 F.2d 372, *cert. denied*, 359 U.S. 998 (1959); *People v. Lee*, 84 Misc.2d 192, 375 N.Y.S.2d 812, 816 (Sup. Ct. 1975). *Cf. Davis v. Mississippi, supra*. Al-

¹¹ The circuit court observed that the government could point to no case in which the inadvertent failure to carry the required identification actually had been prosecuted. 432 F.2d at 582.

¹² The *Edmons* court was careful to limit its conclusion to the extreme factual pattern before it (432 F.2d at 584): "We are not obliged here to hold that when an arrest made in good faith turns out to have been illegal because of a lack of probable cause, an identification resulting from the consequent custody must inevitably be excluded. But in a case like this, where flagrantly illegal arrests were made for the precise purpose of securing identifications that would not otherwise have been obtained, nothing less than barring any use of them can adequately serve the deterrent purpose of the exclusionary rule." [Footnote omitted.] *See United States ex rel. Pella v. Reid, supra*, at 382-83.

though the trial court concluded that the circumstances did not provide the officers with probable cause, the record reveals that their focus on appellant was supported by the facts that (1) he was found near the scene of the recent robberies, (2) he matched the general description provided by the three victims, and (3) he was tentatively identified by the witness Dickens. *Cf. Johnson v. United States, supra*; *United States v. Hall*, 174 U.S.App.D.C. 13, 15-16, 525 F.2d 857, 859-60 (1975).

Nor was the alleged pretext upon which appellant was detained the violation of a rarely enforced statute, the investigation of which was abandoned as soon as the apprehension was effected.¹³ While we express no approval of the officers' investigatory tactics, we do not view the facts as presenting the sort of egregious misconduct the deterrence of which would warrant the extreme sanction of barring the in-court identification testimony of the victims. *Cf. United States ex rel. Pella v. Reid, supra*, at 382-83; *Paulson v. State*, 257 So.2d 303, 305 (Fla. App. 1972), *federal habeas corpus denied sub nom. Paulson v. Florida*, 360 F. Supp. 156 (S.D.Fla. 1973); *see also Lockridge v. Superior Court*, 3 Cal.3d 166, 474 P.2d 683, 686, 89 Cal.Rptr. 731, 734 (1970) (en banc), *cert. denied*, 402 U.S. 910 (1971).

¹³ While the officers did not deny that they were interested primarily in the robberies, the record reveals that they dutifully pursued the truancy matter after appellant had been taken into custody, and released him soon after his non-truancy had been established. Unlike the enforcement of dormant statutes such as those requiring the possession of selective service identification, the mandate that all children between the ages of seven and 16 attend school is regularly enforced, and, as in the case before us, the possibility of its breach may come to the officer's attention before the intrusion of stopping the individual.

The Supreme Court recently declared that "the policies behind the exclusionary rule are not absolute" and "must be weighed in light of competing policies." *Stone v. Powell*, *supra*, at 3049. Against whatever incremental deterrence arguably might be provided by barring the victims' in-court testimony, in addition to the photographic and lineup identifications which were excluded by the trial court, must be weighed the costs of such a penalty.¹⁴ See *Brown v. Illinois*, *supra*, at 608-12 (POWELL, J., concurring in part).

Appellant does not seriously contend that the women's recollections of the robberies became tainted by the fact of the illegal arrest. He does not deny that the police were aware of both the fact of the assaults and the identities of the complaining witnesses prior to the disputed detention. Rather, he argues that but for the detention the officers would not have learned his identity, and consequently there would have been no prosecution and no opportunity for the chain of separate circumstances to coalesce into the incriminating identification testimony.¹⁵ In the final analysis, what appellant seeks

¹⁴ See *Michigan v. Tucker*, *supra* note 9, at 450: "[W]hen balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce."

¹⁵ Appellant's argument goes too far, for if the offending link in the chain is the knowledge of the identity of the particular individual to whom the untainted recollections and other evidence pertain, the appropriate remedial response would be to require the police to disgorge such knowledge. However, unlike other forms of evidence which can be forever excluded from any use by the government in a prosecution of the individual, improperly gained knowledge of a felon's identity cannot be so easily erased. Cf. *Etheridge v. United States*, 380 F.2d 804, 808 (5th Cir. 1967) ("the facts

is no less than an immunity from any prosecution. On the facts of this case, such a price would be too high.¹⁶ See *Gissendanner v. Wainwright*, *supra*; *People v. Lee*, *supra*. As the circuit court observed in a similar case, *Payne v. United States*, *supra*, at 98, 294 F.2d at 727:

The suppression of the testimony of the complaining witness is not the right way to control

obtained through the unlawful conduct do not become 'sacred and inaccessible'"). It would be a ridiculous charade to require that appellant's conviction be set aside so that the police could attempt a new investigation of the robberies by officers unaware of the tainted information. See *Gissendanner v. Wainwright*, *supra*, at 1296. Cf. *Stevenson v. Mathews*, *supra*, at 63.

¹⁶ In *Gissendanner v. Wainwright*, *supra*, the Fifth Circuit reached a similar conclusion. In rejecting what would in effect be a grant of immunity, it reasoned (482 F.2d at 1297):

Certainly, before any consequences so destructive of society's right to be protected from violent crimes is to be set in motion, there would have to be a respectable showing that (i) it was *solely* through such invalid source that identity was ascertained, and (ii) there was no likelihood that it would have subsequently been discovered through other police efforts.

Similarly, in *United States v. Friedland*, *supra*, at 861, the Second Circuit declared:

Courts must neither so narrow the [exclusionary] rule as to impair its presumed deterrent effect nor expand it in such a way that in order to achieve a marginal increment of deterrence, society will pay too high a price. * * * We are confident [that the Supreme Court] would . . . hold that to grant a life-long immunity from investigation and prosecution simply because a violation of the Fourth Amendment first indicated to the police that a man was not the law-abiding citizen he purported to be would stretch the exclusionary rule beyond tolerable bounds.

the conduct of the police, or to advance the administration of justice. The rights of the accused in a case like the present are adequately protected when the complaining witness takes the stand in open court, for examination and cross-examination.

We conclude that the trial court did not err in denying appellant's motion to exclude the in-court identification testimony of the robbery victims.

Affirmed.

FICKLING, Associate Judge, dissenting: The issue presented by this case is whether the in-court identification was the direct "fruit" of an illegal, sham arrest of appellant and, as such, should have been suppressed. The majority is of the opinion that the arrest here was not a sham and therefore affirms the ruling below. I disagree.

The trial court found, and the government conceded during the suppression hearing, that appellant was under arrest when he was transported to Park Police Headquarters for the picture-taking procedure. As this court noted in *District of Columbia v. Perry*, D.C.App., 215 A.2d 845, 847 (1966), quoting *Price v. United States*, D.C.Mun.App., 119 A.2d 718, 719 (1956), "the essence of an arrest 'is a restriction of the right of locomotion or a restraint of the person.'"

The arrest of appellant as a suspected truant was a patent sham, designed solely to obtain identification evidence of his possible involvement in unrelated crimes, for which there existed no probable cause.¹ Such sham

¹ The trial court properly found that there was no probable cause to arrest appellant for robbery where there was a police lookout for a Negro male, age 15-18, with a slender build

or pretextual arrests consistently have been condemned. See, e.g., *Hill v. United States*, 135 U.S.App.D.C. 233, 418 F.2d 449 (1968); *Amador-Gonzalez v. United States*, 391 F.2d 308 (5th Cir. 1968); *United States v. Harris*, 321 F.2d 739 (6th Cir. 1963); *Taglavore v. United States*, 291 F.2d 262 (9th Cir. 1961); *Charles v. United States*, 278 F.2d 386 (9th Cir. 1960); *McKnight v. United States*, 87 U.S.App.D.C. 151, 183 F.2d 977 (1950). A court should not indulge in "ex post facto extrapolations of all crimes that might have been charged on a given set of facts at the moment of arrest . . . [for] such an exercise might permit an arrest that was a sham or fraud at the outset, really unrelated to the crime for which probable cause to arrest was actually present to be retroactively validated." *United States v. Martinez*, 465 F.2d 79, 81-82 (2d Cir. 1972), quoting *United States v. Atkinson*, 450 F.2d 835, 838 (5th Cir. 1971). Nor will such an arrest be valid when it was merely a ploy or pretext used to afford police the time and opportunity to investigate and amass facts sufficient to constitute probable cause. *Martinez, supra*; *Atkinson, supra*; *Mills v. Wainwright*, 415 F.2d 787 (5th Cir. 1969); *Staples v. United States*, 320 F.2d 817 (5th Cir. 1963).

The majority relies on *Ker v. Illinois*, 119 U.S. 436 (1886), and *Frisbie v. Collins*, 342 U.S. 519 (1952). For years, these two cases have been the crux of a doctrine to the effect that the government's power to prosecute a defendant is not impaired by the illegality

and light complexion, and appellant, a Negro male, age 16, was seen 3 days after the last reported incident standing in a public place at midday in a nonconspicuous manner. See *Gatlin v. United States*, 117 U.S.App.D.C. 123, 326 F.2d 666 (1963).

of the method by which it acquires control over him. Due process was satisfied so long as the defendant had "a fair trial in accordance with constitutional procedural safeguards." *Frisbie*, *supra* at 522; see *Ker*, *supra* at 440. However, since *Frisbie*, the Court has made an effort to deter police misconduct. Due process has been extended to exclude the fruits of the government's own deliberate and unnecessary lawlessness in bringing an accused to trial. See *United States v. Russell*, 411 U.S. 423, 430-31 (1973); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Silverman v. United States*, 365 U.S. 505 (1961). Moreover, in recent years the *Ker-Frisbie* rule has been strongly criticized. See *United States v. Toscanino*, 500 F.2d 267, 272 (2d Cir. 1974); *United States v. Edmons*, 432 F.2d 577, 583 (2d Cir. 1970); *Government of Virgin Islands v. Ortiz*, 427 F.2d 1043, 1045 n.2 (3d Cir. 1970).

I find I cannot agree with the position taken by the majority that the admissibility of the in-court identification was controlled by the "independent basis" test. The Supreme Court's stated concern in *United States v. Wade*, 388 U.S. 218 (1967), was the reliability of in-court identifications which are based upon suggestive out-of-court identifications. This differs greatly from the gravamen of the Court's decision in *Wong Sun v. United States*, *supra*, which was the deterrence of improper government activity by the exclusion of otherwise reliable evidence. The question before us here is not whether the in-court identification was reliable, but whether it was the fruit of the illegal, sham arrest and, as such, should have been excluded notwithstanding reliability.

The instant case differs greatly from most that have dealt with the use of the "fruits" of illegal arrests. The arrest here violated the Fourth Amendment not so much because the police officer lacked probable cause, but because he deliberately seized appellant on a mere pretext for the purpose of obtaining his photograph and displaying it to the victims of the robberies. See *United States v. Edmons*, *supra*. Hence, in my view the majority's reliance on *Bond v. United States*, D.C.App., 310 A.2d 221 (1973), and *Payne v. United States*, 111 U.S.App. D.C. 94, 294 F.2d 723, *cert. denied*, 368 U.S. 883 (1961), is misplaced since neither of those cases involved a sham or pretextual arrest.

The Supreme Court has prescribed that our inquiry in cases where a primary illegality has been demonstrated must be

whether, granting establishment of the primary illegality, the evidence to which instant objection is made had been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. [*Wong Sun v. United States*, *supra* at 488, quoting *MAGUIRE, EVIDENCE OF GUILT*, 221 (1959).]

Here, the illegal arrest of appellant for the sole purpose of obtaining and exhibiting his photograph to the robbery victims, with a view toward having any resulting identification duplicated at trial, is clearly an exploitation of the "primary illegality." *United States v. Edmons*, *supra*. See also *Davis v. Mississippi*, 394 U.S. 721 (1969); *Bynum v. United States*, 107 U.S.App.D.C. 109, 274 F.2d 767 (1960). Such an illegal arrest made for the precise purpose of securing identifications that otherwise would not have been obtained epitomizes, in

my view, the evils sought to be prevented by the exclusionary rule.

Generally, the exclusionary rule has been applied in cases where the primary illegality is somehow connected with the evidence-gathering or investigative process. See, e.g., *United States v. Wade*, *supra*; *Wong Sun v. United States*, *supra*; *Nardone v. United States*, 308 U.S. 338 (1939); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). It is within this context that the Second Circuit Court of Appeals explained in *United States v. Edmons*, *supra* at 584, that the government "exploits" an illegal arrest when it obtains a conviction based on evidence gathered pursuant to its unconstitutional act.

The majority's attempt to distinguish *Edmons* from the instant case is tenuous at best. The fact that 50 law enforcement officers were involved in *Edmons*, as opposed to 2 officers here, is of no moment. As in *Edmons*, the officers here knew only that the suspect was "young and black." Moreover, the arrests in both cases were mere pretexts made in bad faith, without probable cause, and ostensibly for truancy here and Selective Service Act violations² in *Edmons*, but in reality for the purpose of obtaining identification evidence in unrelated crimes.³

² Defendants were charged with failure to have their Selective Service cards in their possession in violation of 18 U.S.C.A. § 111; Military Selective Service Act, § 12(b)(6), 50 U.S.C.A. App. § 462(b)(6).

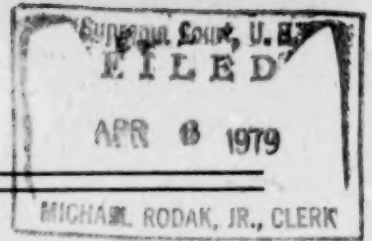
³ During a pretrial suppression hearing in this case, the arresting police officer acknowledged that he considered appellant a potential suspect in the robbery cases from the moment he first saw him. He tried to explain that photographing was "customary procedure" in truancy cases. However, that testimony was flatly contradicted by the robbery

As the Supreme Court has instructed, the exclusionary rule is calculated to deter. Its function is "to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960). There is also a second function of the rule, and that is the "imperative of judicial integrity." *Elkins*, *supra* at 222. See also *United States v. Peltier*, 422 U.S. 531, 536 (1975). The mainstay of the judicial integrity theory is that courts should not act as "accomplices in the willful disobedience of [the] Constitution." *Elkins*, *supra* at 223. In other words, by suppressing evidence which has been illegally seized, a court's integrity remains intact by its refusal to perpetuate a violation of the constitutional rights of an accused.

Accordingly, for the above reasons, I dissent.

squad detective who took the photographs and acknowledged that his real purpose was to obtain pictures to show to complaining witnesses in the robbery cases.

APPENDIX



In the Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-777

UNITED STATES OF AMERICA,

Petitioner,

—v.—

KEITH CREWS

ON WRIT OF CERTIORARI TO THE DISTRICT
OF COLUMBIA COURT OF APPEALS

PETITION FOR CERTIORARI FILED NOVEMBER 10, 1978
CERTIORARI GRANTED FEBRUARY 21, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-777

UNITED STATES OF AMERICA,

Petitioner,

—v.—

KEITH CREWS

ON WRIT OF CERTIORARI TO THE DISTRICT
OF COLUMBIA COURT OF APPEALS

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Portions of the one volume transcript containing both the suppression hearing and the trial held on April 22, and 23, 1974 in the Superior Court of the District of Columbia (pages 3-30, 36-40, 48-64, 79-81, 97-100, 106-120, 122-126, 132-137 and 143-149)	8
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**SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA**

Case No. 2679-74

UNITED STATES/DISTRICT OF COLUMBIA

vs.

KEITH CREWS

RELEVANT DOCKET ENTRIES

DATE

PROCEEDINGS

1-16-74 Defendant arraigned, informed of Right to Counsel and informed of complaint, defense counsel appointed, defendant ordered to appear in a lineup on January 21, 1974.

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA

Case No. 10258-74

UNITED STATES

v.

KEITH CREWS

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
2-22-74	Indictment filed. Assigned to Judge Campbell, arraignment set for 3-8-74 at 10:00 a.m.
3- 8-74	NORMA J. HOUGHTON, OFFICIAL COURT REPORTER. Defendant informed of complaint(s) and right to Counsel, plea of guilty entered, defendant placed on P.R., Third Party Custody. Case continued to 3-29-74 for Status Hearing.
3-26-74	ROSE MOLlicHELLI, OFFICIAL COURT REPORTER. Status Hearing held. Case continued to 4-5-74 for another Status Hearing.
4- 5-74	ARTHUR B. REID, OFFICIAL COURT REPORTER. Status Hearing held. Trial for 4-22-74, bond to remain.
4-22-74	ARTHUR B. REID, OFFICIAL COURT REPORTER. Defense Motion to Suppress Identification heard and the findings by the Court there did not exist probable cause on the date of, for the Officer to arrest the defendant, therefore the Court Suppress the Photos taken by

DATE	PROCEEDINGS
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the Police Officer, and the Photos of the lineup. (2) The Court will allow the complaining witnesses to make in-Court identification. The Jury impanelled and sworn at 4:15 p.m., after opening statements by both Counsel, the Court adjourned. Case continued to 4-23-74.

4-23-74 ARTHUR B. REID, JR., OFFICIAL COURT REPORTER. Testimony resumed at 9:40 a.m. at the close of Government's case, defense motion for Motion for Judgment of Acquittal denied. The Jury began deliberation at 4:30 p.m., the jury reached its verdict at 6:30 p.m., verdict guilty as to armed Robbery; the Jury did not consider counts "B" & "C", the Jury returned its verdict as to counts (4) not guilty; "5" Not guilty; "6" Not guilty; "7" Not guilty; "8" Not guilty, bond to remain. Report and sentence date 5-24-74.

5-24-74 JOHN G. BYERS, OFFICIAL COURT REPORTER. The defendant is sentenced to (armed robbery) Imposition of Sentence Suspended Probation for (4) Four Years under 5010(A). Conditions:

(1) Complete High School, and any other conditions imposed by probation.

(2) Remain in Household of Parents, the Probation Department to submit a report every (6) Six Months.

6-3-74 NOTICE OF APPEAL FILED THIS DATE. eep

DISTRICT OF COLUMBIA, COURT OF APPEALS

Case No. 8507

KEITH CREWS, APPELLANT

v.

UNITED STATES, APPELLEE

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
6-10-74	Preliminary record.
7-29-74	Transcript of Record TRC.
8- 1-74	Supplemental record (242 pages of transcript).
1-15-75	Order extending appellant's time to file his brief to Feb. 10. No further extensions of time will be granted appellant for filing said brief. (Ky)
2-20-75	ORDER directing counsel for appellant to file a statement on or before March 3, 1975, indicating why he has failed to file a brief or some appropriate motion. (Ky)
2-28-75	Motion of appellant for leave to file brief, time having expired (m-28).
3- 4-75	Clerk's order granting appellant leave to file brief.
3- 4-75	Appellant's brief. (m-28) List (m-25)
4- 3-75	Clerk's order granting appellee ext. to file brief to May 2.
5-16-75	Clerk's order granting appellee leave to file brief.

DATE	PROCEEDINGS
5-16-75	Appellee's Brief. (m-5)
7- 8-75	Appellant's reply brief. (m-3)
7-16-75	ARGUED before Judges Fickling, Nebeker and Harris.
2-16-77	OPINION Per Associate Judge Stanley S. Harris. Dissenting opinion per Associate Judge Austin L. Fickling. Judgment affirming the judgment on appeal.
3- 2-77	Petition of appellant for an ext. to Mar. 16 to file for rehearing en banc (m-2) GRANTED/cog
3-16-77	Motion of appellant to extend time to file petition for rehearing en banc to March 23rd (m-16) GRANTED (COG)
3-23-77	MANDATE ISSUED
3-23-77	Motion of appellant to extend time to file petition for rehearing en banc to March 30th (m-23) GRANTED (COG)
3-30-77	Motion of appellant to extend time to file petition for rehearing en banc to April 6th (m-30) GRANTED (COG)
4- 6-77	Petition of appellant for rehearing and/or suggestion for rehearing en banc (m-6)
5-12-77	ORDER vacating the mandate of March 23, 1977 and the Judgment of February 16, 1977. This cause shall be scheduled for argument en banc at a future date, etc. (Judges Newman, Kelly, Kern, Gallagher, Nebeker, Yeagley and Harris and Mack)
5-13-77	Mandate returned from Clerk, Superior Court per order
10- 3-77	Motion of appellee for permission to file supplementary memorandum (p-3)
10- 3-77	ORDER granting appellee's motion for permission to file supplementary memorandum (Nw)

DATE	PROCEEDINGS
10- 3-77	Supplemental Memorandum (p-3)
10- 5-77	ARGUED EN BANC before Judges Newman, Kelly, Kern, Gallagher, Nebeker, Yeagley, Harris, Mack and Ferren.
10-13-77	Motion of appellee for leave to file supplemental memorandum (p.13)
10-18-77	ORDER granting appellee's motion for leave to file lodged supplemental memo and indicating counsel for appellant may file memo in response within 10 days (Nw)
10-18-77	Supplemental Memorandum
10-31-77	Motion of appellant to extend time to file response to supplemental memorandum to Nov. 7th (m-31)
11- 4-77	ORDER granting appellant's motion for extension of time within which to file response to government's supplemental memorandum to Nov. 7. (New)
11- 7-77	Motion of appellant to extend time to file response to supplemental memo to Nov. 17th (m-7)
11-16-77	ORDER granting appellant's motion to extend time to file response to supplemental memo to Nov. 17th. (New)
11-30-77	Motion of appellant for leave to file response to appellee's supplemental memorandum (m-30)
12- 7-77	Granted (Nw)
12- 7-77	Appellee's Supplemental Memorandum.
6-14-78	OPINION for the Court by Judge Ferren, with whom Judge Newman, and Judges Kelly, Kern, Gallagher, Yeagley and Mack, concur.
	Dissenting opinion by Judge Nebeker, with whom Judge Harris concurs.
	Dissenting opinion by Judge Harris, with whom Judge Nebeker concurs.

DATE	PROCEEDINGS
7- 6-77	MANDATE ISSUED
11-16-78	Notice of filing petition for writ of certiorari dated November 10, 1978 in Supreme Court. Supreme Court No. 78-777.

PORTIONS OF TRANSCRIPT HEARINGS
APRIL 22 AND 23, 1974

[3] PROCEEDINGS

THE DEPUTY CLERK: Case of United States versus Keith Crews, Docket Number 10258-74.

THE COURT: If you need more time to talk to your client, Mr. McHale, I'll give it to you.

MR. McHALE: We're ready to go forward today, Your Honor. The trial is scheduled for today and there is an identification motion which is set prior to trial.

THE COURT: Are you ready?

MR. McHALE: Yes, Your Honor.

MR. BENNER: The Government's ready, Your Honor.

THE COURT: Very well, proceed.

MR. BENNER: Your Honor, Carol Owens will be our first witness, Your Honor.

Thereupon,

CAROL OWENS,

having been called as a witness for and on behalf of the Government, and having been first duly sworn by the Deputy Clerk, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. BENNER:

Q. What is your full name, Miss Owens?

A. Carol Owens.

Q. And where do you live, Miss Owens?

A. At the present time I'm living in Spokane, Washington.

[4] Q. On January 3rd 1974, were you in the District of Columbia?

A. Yes, I was.

Q. And why were you here?

A. Our school is under a system called 414. That's numerals. One part stands for short term class where

we intensively study one system in particular. And my one subject that I was studying was government, and I did this by coming back to the District of Columbia to study the Government firsthand.

Q. At around between 11:00 o'clock in the morning and noon were you at the Washington Monument on January 3rd?

A. Yes, I was.

Q. And do you remember about 11:30 exactly where you were?

A. At 11:30 I was heading towards the bathroom to utilize the facilities there.

Q. Whereabouts is this bathroom?

A. It's the bathroom that's kind of down at the bottom of the hill. Like there's the monument and then there's a bathroom or rest station down at the bottom of the hill off to the side of the monument.

Q. And what happened while you were using this facility?

A. This guy came in and within a period of about five to ten minutes he took \$10 from me at gunpoint.

[5] Q. Where exactly were you when this robbery took place?

A. I was in a stall utilizing the facilities.

Q. Would you tell us when you first noticed there was someone in there?

A. I was sitting and just about getting ready to get up and leave when I saw two eyes peering—I was in the stall right next to the wall and like there's a little crack or space about yea big (indicating), and I saw the man's eyes looking through the stall and I recognized the eyes as being a man's. And I then became really scared.

Q. Did this person say anything to you?

A. Not at that point. But after our eyes met he reached his hand on top of the door and asked me to let him in.

Q. What did you do?

A. I asked him—I said, "No, please don't," or something to that effect, and after that he asked me for \$10, and I lied and I said that I didn't have it. Then he pointed the gun over the door and I stopped lying and gave him the \$10.

Q. What happened after you gave him the money?

A. He asked me for \$10 more and I told him this time I honestly did not have \$10 more, and he didn't believe me. So he then got up on top of the toilet in the stall right next to mine and looked over. And I opened up my wallet and [6] I showed it to him. I also opened my purse, and I even offered him a Traveler's Check, but he told me he didn't want any checks.

Q. What happened after he indicated—you indicated that you didn't have any money more?

A. He got out of the stall next to mine and asked me for entrance into my stall. And then knowing that he had a gun and being scared to death that he was going to do something to me, I let him in.

Q. Then what happened?

A. He kind of made a motion toward the zipper of his pants and I asked him—I pleaded with him not to rape me. And he made a motion towards the hem of my dress and I flinched away, and then he asked me—I can't remember the exact order of things, but he then asked me if I'd suck his penis, and I told him not to make me do that. He asked me if he could feel my breasts, and I didn't actually see the gun then, but I was so scared that he was going to hurt me or hurt me more if I didn't let him do anything, so I let him feel my breast. Then he asked me if he could suck my breast and he reached towards the button my blouse and I flinched away. I said, "Please, don't make me do that." And I asked him to leave, and he left saying telling me to wait there for 20 minutes or he was going to come back and shoot me.

Q. Would you tell us what the lights inside of the [7] ladies comfort station were like?

A. Well, they are very similar—like they were fluorescent. The lighting was just a little bit darker than this (indicating), but not very much.

Q. Were you able to see fairly well inside there?

A. Yes, I was.

Q. Did you get a good look at the face of the person who attacked you?

A. Yes, I did.

Q. How long a period of time would you estimate that you were able to see his face?

A. A minute and a half to about two minutes while he was in the stall.

Q. Could you describe what that person looked like.

A. He was about five five to five eight; very dark complexioned. He didn't have any wrinkles in his face. I surmised that he was about 16 to 18 years old because he didn't have any wrinkles in his face and he had a pea cap on so I could see like he eyebrows. And he had eyes that were kind of round but were kind of long.

Q. What color would you describe him as?

A. He was darkly complected.

Q. Did you notice what clothes he had on?

A. Yes. He had kind of a loose or a sloppy raincoat on and a V-neck sweater with a T-shirt on underneath, and [8] his pants seemed like they were kind of loose. But I noticed they weren't Levi's.

Q. After this occurrence was over, did you notify the police?

A. Not immediately, no.

Q. Did there come a time when you did notify the police?

A. Yes. About 20 minutes after it happened.

Q. Did the police come and talk to you about it?

A. Yes.

Q. And this offense took place on the 3rd of January; is that right?

A. Yes, it did.

Q. Do you remember being showed, the next day I believe it was, on the 4th. Excuse me. What time was this when this attack took place?

A. About 11:45.

Q. In the morning?

A. Yes.

Q. Do you recall being shown pictures of possible suspects after this offense occurred?

A. Yes, I do, at the Metropolitan Police Department Headquarters.

Q. Do you remember about how many pictures you saw?

A. I think the police estimated about a hundred.

Q. Did you see the picture in there of the man that [9] committed this offense?

A. I saw a picture of someone who looked like him but I really didn't—I rated it about an eight.

Q. About an eight? Would you tell us what you mean by about an eight?

A. Well, on a scale of about one to ten I would rate it at about an eight. It looked really a lot like him but it really wasn't exactly like him.

Q. So your conclusion was that it was or was not the man?

A. It was not the man.

Q. Do you remember talking to a Detective Orr on January 10th 1974?

A. Yes.

Q. Do you remember he showed you some pictures of possible suspects?

A. Yes. At the Park Police Headquarters.

Q. Did you pick out from that group of pictures one person that you said committed this offense?

A. Yes, I did.

MR. BENNER: Could I have this marked as Government's Exhibit 1A and 1B for identification, please.

(Government's Exhibit 1A and 1B for identification were duly marked.)

BY MR. BENNER:

[10] Q. At the time you picked out these pictures and Detective Orr showed them to you, do you know what Detective Orr said to you before you looked at them?

A. He just said—Well, as a matter of fact, no, I don't. He just said look at the pictures. And there were some pictures there that he wanted me to see, and I looked at them.

Q. Did he indicate any particular picture for you to focus on?

A. No.

Q. I show you what has been marked as Government's Exhibit 1A and B for identification. Would you tell us what they are, please.

A. These are the pictures that Detective Orr showed me.

Q. Did you pick out a picture from those, and if so, would you tell us what picture it was.

A. I picked out Number 6.

Q. Did you go to police headquarters on January 21st of this year and attend a lineup?

A. Yes, I did.

Q. And did you pick out someone from that lineup as having committed this offense?

A. Yes.

Q. And do you remember what number shield he was wearing?

A. I believe it was Number 7.

MR. BENNER: May this be marked as Government's [11] Exhibit Number 2, please.

(Government's Exhibit 2 for identification was duly marked.)

BY MR. BENNER:

Q. I show you Government's Exhibit Number 2 for identification. Would you tell us what this is please.

A. This is the lineup on that night.

Q. And Number 7 is the person in that lineup that you picked out?

A. Yes.

Q. Would you take a look around the courtroom right now, please, and tell us if the man that robbed you on January 3rd is presently in the courtroom, please.

(A pause.)

A. It's that guy sitting over there (indicating).

MR. BENNER: May the record reflect the witness has indicated the defendant?

THE COURT: The record will reflect the witness has identified the defendant as being the person who robbed her.

MR. BENNER: No further questions of the witness, Your Honor. I do have quite a bit of Jencks material, Your Honor, and I would like to indicate for the record that I am giving Mr. McHale the Grand Jury testimony of this witness, other witnesses, and Grand Jury sum-

maries, and an individual statement of Miss Owens, and numerous Park Police reports, [12] Your Honor. And also a Park Police report of approximately seven pages. And also a Park Police report of about five pages by Detective Ore. These reports relate to these two incidents.

MR. McHALE: Your Honor, will the Court indulge me briefly while I have an opportunity to look through these. I haven't had a chance to look through them before.

THE COURT: How long do you need?

MR. McHALE: Ten minutes, Your Honor.

THE COURT: Do you have anything else?

MR. BENNER: Yes. I have some other material.

THE COURT: Well, why don't you give it to him all at once. You know you have to give it to him anyway. Why don't you give it to him now and save some time?

MR. BENNER: Yes. I have a copy here also of the radio run that was given on the day of the offense—the first offense. And I believe, Your Honor, that's all the Jencks material I have.

THE COURT: Very well. I'll give you ten minutes.

(Whereupon, the proceedings were recessed at approximately 11:30 o'clock a.m.)

(Whereupon, the proceedings were resumed at approximately 11:40 o'clock a.m.)

THE COURT: Are you ready to proceed?

MR. McHALE: Yes, Your Honor.

[13] THE COURT: Very well.

CROSS EXAMINATION

BY MR. McHALE:

Q. Now Miss Owens, on January 3rd of this year, what were you doing immediately before the time that you went into the ladies rest room where you say you were robbed?

A. I just had walked down the steps of the monument and was looking for the bathroom.

Q. Were you directed by anyone to the bathroom?

A. One of the concession stand people told me.

Q. And you paid no particular attention to any people who were around at that time?

A. No, sir.

Q. When you got into the bathroom how long were you in there before anyone else entered?

A. Two, three, maybe five minutes.

Q. During the period of time—at the time this other person entered you say you were in the stall of the bathroom?

A. Yes, sir.

Q. You didn't actually see anyone enter, then, you just heard; is that right?

A. Yes, sir.

Q. By that you mean that's correct; you didn't see anyone enter?

A. I don't quite understand what you mean.

[14] Q. From the stall where you were could you see the entrance to the bathroom?

A. No.

Q. When was the first time you became aware that someone else was inside the bathroom?

A. When the assailant immediately came by that little crack.

Q. At that time all you saw was the form of a body walking by the crack; is that correct?

A. No, sir.

Q. What did you see at that point?

A. At the point that I saw the person—I saw the person.

Q. How wide a crack are we talking about?

A. About four inches, I guess.

Q. And this person first walked by the crack—did he walk by the crack or did he come up to the crack and then stop?

A. Yes. He came straight to the crack and then he stopped.

Q. How long was he at this crack before you say he went into the next stall and climbed up on top of the toilet?

A. About one to two minutes.

Q. At the time you were looking at him through the crack from inside the stall you couldn't see but just the four inches that the crack allowed you to see through; is that [15] correct?

A. Yes.

Q. I think you testified on direct that the only time that you got to look at his face was approximately one and a half to two minutes when he was actually in the stall with you.

A. No, sir, I did get a good look at him then, but I also saw him when he stepped on the toilet in the stall next to mine.

Q. How long was he standing on the toilet?

A. About 30 to 45 seconds.

Q. At what point was this alleged gun produced?

A. Right immediately after I told him I didn't have \$10.

Q. That's when he started looking through the crack?

A. No, he wasn't looking through the crack when he was asking me for the stuff.

Q. So you couldn't see him at that point?

A. No, sir.

Q. How did you first see the gun? Was it stuck through the crack or over the top?

A. Over the top.

Q. And your testimony is at that point all you could see was the gun; you couldn't see the person?

A. Yes.

Q. Have you ever been robbed at gunpoint before?

[16] A. No.—No, counselor, I have not.

Q. Have you ever been robbed at all before?

A. No, counselor, I have not.

Q. How long was the gun over the top before the person with the gun came into view?

A. Okay—He pointed the gun over the top. I gave him the money—

Q. Again over the top?

A. Yes, sir. And he asked me for \$10 more. Probably a minute and a half was the amount of time it took.

Q. During this whole amount of time he's talking to you through the door; is that correct?

A. Yes.

Q. How long when the person stopped and looked into the crack, how long was it before he stuck the gun over the top of the stall?

A. Okay—Are you asking me the period of time?

Q. How long was your first sighting of him through the crack?

A. Maybe 15 or 20 seconds.

Q. And then you lost sighting of him for one or two minutes until he entered the store next door and climbed up on top of the toilet, then you saw him for approximately 30 seconds; is that right?

A. Possibly 35.

[17] Q. Then he got back down and went out in front of your stall again?

A. Yes, sir.

Q. How did he gain entry into your stall?

A. He asked for it.

Q. At this point where was the gun if you can remember?

A. When he asked for entry into the stall, you mean?

Q. Yes.

A. I don't remember.

Q. And then he came into the stall and he was in the stall for perhaps one and a half to two minutes; is that right?

A. Yes, sir.

Q. So out of the total of ten minutes or so that he was in the bathroom you had a good view of him for perhaps two to two and a half minutes?

A. Two and a half to three minutes, probably, yes.

Q. You testified on direct examination that the lighting in the bathroom was fluorescent lighting.

A. Yes, sir.

Q. Do you recall testifying before the Grand Jury in this case on the 25th of January of 1974?

A. Yes.

Q. And while you were testifying before the Grand Jury you were asked a series of questions and gave answers to those questions; is that right?

[18] A. Yes.

Q. Do you recall being asked at the Grand Jury and answering the following:

"Question. What was the lighting conditions in the ladies room?

"Answer. It wasn't as bright at this. It was just like regular light."

A. Yes, that's correct.

Q. By that did you mean regular bulb light?

A. I wasn't speaking particularly to the type of light it was; whether it was incandescent or fluorescent. I was speaking as to how bright it was in there.

Q. The lighting in the Grand Jury room is fluorescent, isn't it?

A. I don't remember.

Q. At any rate, you didn't describe it then as being fluorescent lighting?

A. No, I did not.

Q. Now, when you were shown photographs I believe on January 10 at Park Police Headquarters—How did you happen to get down to the Park Police Headquarters that morning?

A. A friend of mine drove me down there.

Q. Had the Park Police called you and told you to come down?

A. Yes, sir.

[19] Q. And they said what? They wanted you to look at some photographs of suspects or a suspect?

A. Yes. Detective Ore said that he had some more pictures for me to look at.

Q. Showing you what has been marked as Government's Exhibit 1. Can you recall how these photographs were shown to you?

A. Okay. They were shown to me in like chronological order. Like this one—they were in a folder (indicating), and there was a bunch of other pictures, too, of other cases, I guess.

Q. But the officers told you that these two pages (indicating) were photographs for your case?

A. No. They just said they were a bunch of photographs of people.

Q. Did they tell you where to start in the book?

A. No, they did not—well, he just turned the first page and then said to start from there.

Q. And these are in the book and you are flipping through the book; is that correct?

A. Yes.

Q. And I believe you say that you picked Number 6.

A. Yes, sir, that's correct.

Q. Was there any conversation going on between you and the Park Police as you were looking through the book?

[20] A. I don't really understand. What kind of conversation are you speaking of?

Q. Were you talking about the identification or were you talking about the robbery as you were looking through these pictures?

A. To be perfectly honest with you, counselor, I can't remember.

Q. When you got to the photograph album and page 6, can you recall what your words were?

A. Well—

Q. To the best of your recollection.

A. Well, my heart started beating very fast and I said—I started making all sorts of exclamatory noises that probably didn't make any sense.

Q. What were the first words you used to indicate that you were trying to make an identification?

A. I honestly don't remember. See, like I looked at this one (indicating) first, and then instantly my mind sort of focused on this picture because of my recollection of the robbery.

Q. Were there any other pictures of the group that you were shown that even in your mind remotely resembled the robber?

A. No, sir.

Q. There were no other photographs?

[21] A. Yes. That is correct. There were not any other photographs, counselor, that resembled the robber.

Q. At the evening of the lineup had you had occasion to discuss prior to your going into the lineup room the identification procedure that you would be going through on that evening?

A. Yes. I believe the policeman that was in charge explained the procedure.

Q. Had he indicated to you either that night or sometime previous to that night that the person whose photograph you identified previously would be in that lineup?

A. I don't correctly recall.

Q. Do you recall having any conversation about who might or might not be in the lineup with any Park Police or Metropolitan Police Officer?

A. I vaguely remember one of the detectives saying he might be in it or something. But I honestly can't remember.

Q. You have a vague recollection that he might be in it, meaning the person whose picture you picked out before might be in it?

A. Possible, but I really can't be sure.

Q. Showing you what has been marked as Government's Exhibit 2 for identification, I believe you indicated you picked Number 7 out of that lineup.

A. Yes.

[22] Q. How many other men would you say are in that line that you would put in the age group of 15 to 18 years old?

A. Possibly Number 5 and Number 11 I would possibly surmise his age to be around 18, and Number 9 and also Number 8.

Q. So then we're talking about Number 5 and Number 9 and Number 8—Out of those, how many—

MR. BENNER: Objection, Your Honor. I believe she included Number 11 also.

THE COURT: Is that correct?

THE WITNESS: Yes, sir.

BY MR. McHALE:

Q. Out of the four that you picked as being possibilities how many of those are wearing a large bush in that photograph?

MR. BENNER: Your Honor, the picture speaks for itself and the Court may inspect it. There's no need for the witness to describe what the picture portrays.

MR. McHALE: Your Honor, out of a lineup of ten people we're down to the witness saying she only was effectively looking at four or five.

MR. BENNER: She didn't say that, Your Honor. She answered as to how many people fell into a certain age group. I believe that was the question by defense counsel.

THE COURT: I understood her testimony to be Number 5, Number 9, Number 8 and Number 11 and Number 7.

[23] MR. McHALE: So given the description that she had given of the robber being between 15 and 18, the only conclusion one can draw is that those were the only five people she was looking at in that line. And I think there may be other indications that there were only one or two people that she was effectively looking at.

MR. BENNER: Your Honor, if I may state that's a conclusion possibly that the Court may care or may not care to draw. However, there's no need in having the witness describe the evidence itself. The picture, as the Court of Appeals has stated, speaks for itself. As to whether this lineup was suggestive or not can be best determined by having her recount what was said and what happened, by having the trier of fact and the question of law in this case at this point look at it himself.

THE COURT: Let me see the picture. Now what's your question, Mr. McHale?

MR. McHALE: How many persons in fact, Your Honor, she thought were between 15 and 18 years of age, and how many of those five people that she thought were between those ages have a large bush haircut.

THE COURT: You may answer the question.

THE WITNESS: Sir, I was more going on appearance than age. Age didn't really—

BY MR. McHALE:

[24] Q. The question is out of those five people that you thought were between 15 and 18 years of age, how many of those five people had a large bush style haircut?

A. I never said that my assailant had a large bush haircut so that thought never came into my mind.

Q. Aside from what you thought or saw, how many people that you viewed in that lineup—how many people in that age group had a large bush haircut?

A. Four, counselor.

Q. Four of the five that you say were between 15 and 18?

A. Yes, counselor.

Q. Now, of that group of five people that you say were between 15 and 18, Number 8 has facial hair—a mustache, does he not?

A. Yes, counselor.

Q. I believe you also indicated that Number 9 had facial hair; did you not?

A. Yes.

Q. And you also indicated that Number 11 was one of the people—Number 11 has a decidedly different hairstyle than that of Mr. Crews; isn't that correct? And he's also substantially taller; is he not?

A. Yes, counselor, that's correct.

Q. As to the identification that you made in Court today of Mr. Crews, just for the record, are there any other [25] or were there at the time you made the identification—were there any other Negro males in the courtroom?

A. I don't recall. There was this gentleman over here (indicating).

Q. You mean the gentleman sitting at the judge's bench?

A. Yes, sir.

MR. McHALE: No further questions, Your Honor.

MR. BENNER: Just one other question, Your Honor.

REDIRECT EXAMINATION

BY MR. BENNER:

Q. Miss Owens, when you looked through the lineup which is represented in Government's Exhibit 2, why did you identify Number 7 as the man who committed the assault upon you?

A. Because he looked like the guy who attacked me.

MR. BENNER: No further questions, Your Honor.

THE COURT: You may step down.

(Whereupon, the witness stepped down from the witness stand.)

THE COURT: We'll recess now until 1:00 o'clock.

(Whereupon, the proceedings were recessed at approximately 12:05 o'clock p.m.)

(Whereupon, the proceedings were resumed at approximately 1:10 o'clock p.m.)

MR. BENNER: Your Honor, the Government would call Anne Lawson at this time as the next witness for the [26] Government.

Thereupon,

ANNE L. LAWSON,

having been called as a witness for and on behalf of the Government, and after having been first duly sworn by the Deputy Clerk, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. BENNER:

Q. Miss Lawson, please state your full name.

A. Anne Louise Lawson.

Q. And your address, Miss Lawson.

A. Parker Road, Friedland, Maryland.

THE COURT: Please speak up loudly so we can hear you.

BY MR. BENNER:

Q. Miss Lawson, were you in Washington on January 6th of this year?

A. Yes, I was.

Q. At about 3:00 o'clock in the afternoon, did you go to the comfort station at the Washington Monument?

A. Yes, I did.

Q. Who did you go there with?

A. Sandra Denner.

Q. And what happened when you were at the comfort station?

[27] A. Well, I went into the stall and I heard a man's voice a few minutes after I went in. I didn't hear exactly what he said but I heard him demand money and I heard Sandy say, "All right, you can have it," and he made some sort of a threat toward her. And then afterwards he told her to get her friend out, so Sandy called me and I came out and he asked me for \$20 which I didn't have. I showed him my wallet, and my pocket book, that I didn't have any money, so he told us to wait for 20 minutes before leaving or he was going to be waiting for us. So after a few minutes, maybe five minutes, we left and nobody was out there.

Q. Was the man that you saw in the comfort station armed with anything?

A. Yes, he had a broken beer bottle.

Q. Would you tell us what the lighting conditions were on January 6th inside the comfort station.

A. It was brighter than it is in here.

Q. How far away were you from the man who was committing this attack after you came out of the stall?

A. About the distance from myself to this gentleman (indicating).

Q. To the reporter?

A. Yes.

Q. So you are indicating approximately five feet?

A. Yes.

[28] Q. Would you tell us what the man in the comfort station looked like?

A. He had a dark colored jacket and he was a Black man a little taller than myself. He had on a pea cap, a sort of stocking cap, and he was very dark complected and clean-shaven, no mustache or beard or anything.

Q. How tall are you?

A. Five four.

Q. Did you form any opinion as to how old this man was?

A. I wasn't sure but I knew he couldn't possibly be over 22 or 23. He had to be younger.

Q. How long a period of time did you look at this man while he was inside the comfort station?

A. Just a few minutes. I don't know exactly how long, but I was facing him so I did get a good view of him.

Q. Do you remember on the 13th of January an officer from the Park Police showed you a group of photographs?

A. Yes, sir.

Q. And did you identify someone from that group of photographs as being the man who assaulted you?

A. Yes, sir.

Q. I want to show you Government's Exhibit 1A and 1B. Would you tell us what that is, please.

A. These are the group of pictures I looked at.

Q. Which man did you pick out of there (indicating)?

[29] A. Number 6.

Q. Now, did you go to a lineup on January 21st in Police Headquarters?

A. Yes, I did.

Q. Did you pick somebody out of that line as the man who committed this offense?

A. Yes, I did.

Q. Would you take a look at Government's Exhibit 2. What is that, please?

A. That's a lineup.

Q. Which man did you identify in that lineup?

A. Number 7.

Q. For the record, please, would you take a look around the Court and see if you see the man in the courtroom who attempted to rob you on the 6th of January.

A. Yes, sir.

Q. Do you see him?

A. Yes, sir.

Q. Would you point to him, please.

A. The man over there (indicating).

MR. BENNER: May the record reflect she has identified the defendant.

THE COURT: Are you certain that's the man?

THE WITNESS: Yes, sir.

THE COURT: The record will show the witness identified [30] the defendant.

MR. BENNER: No further questions of this witness, Your Honor.

CROSS EXAMINATION

BY MR. McHALE:

Q. Miss Lawson, you say when you first heard a man's voice inside of the bathroom you were in the stall at the time; is that correct?

A. Yes, sir.

Q. And you didn't see a man come in.

A. No, sir.

Q. How long were you in the stall before you came out of the stall.

A. Just a moment or two. I'm not really sure as to a definite length of time.

Q. How far along had the robbery gotten by the time you got out of the stall?

A. By the time I got out of the stall Mrs. Denner had given him the money and her pocketbook was all spread out on the counter.

Q. When you came out of the stall where was the robber?

A. He had Mrs. Denner around the neck.

Q. Was he facing you or was his back to you?

A. He was facing me and he had Mrs. Denner facing me also.

* * *

[36] SANDRA DENNER,

having been called as a witness for and on behalf of the Government, and after having been first duly sworn by the Deputy Clerk, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. BENNER:

Q. Miss Denner, please state your full name.

A. Sandra Denner.

Q. And your address, please.

A. I live in Manchester, Maryland.

Q. Mrs. Denner, were you in Washington on January 6th of this year at about 3:00 o'clock in the afternoon?

A. Yes, sir, I was.

Q. And where were you at that time?

A. At that time we had stopped to go to the rest room at the base of the hill of the Washington Monument.

Q. And were you with Anne Lawson at that time?

A. Yes, I was.

Q. And did you go inside the rest room?

A. Yes, we went inside the rest room.

Q. Would you tell us what happened when you went in there.

A. When we were inside the rest room I was up washing my hands at the basin, and the door opened behind me and I heard that, and an arm came around my shoulder and neck, and [37] something sharp was stuck in my back. I looked up and I saw a face in the mirror. And the guy asked me for \$20—excuse me, he asked me for \$10. And I said, "Okay, I'll give it to you." And I went to get it, but I didn't have \$10 with me. I only had a \$20 bill in my purse which I gave him. At that point he showed me that he had a beer bottle that was broken. He then told me to get my friend out of the stall and he pushed the beer bottle up against my stomach, the broken edge of it, and sort of threatened me with that to try to get my girlfriend to come out. So Anne came out and she told him she didn't have any money, and she showed him she didn't. Then he asked for the other girl who was also in there at the time to come out, and she refused to come out. He then left after that and told us not to come out for twenty minutes. That he was going to wait to see if we came out.

Q. How long approximately was it that this robber was in the comfort station with you?

A. I'd have to estimate—I would say about five minutes.

Q. During how much of that time were you able to look at his face?

A. Well, I was watching the beer bottle pretty closely and his eyes. I did get a look at his face for at least half of the time, and I could see his face. And he was holding me by the arm while I was getting my money out of the [38] purse.

Q. Was there adequate lighting in the restroom?

A. I would see the lighting was adequate, yes.

Q. You mentioned there was a third lady in there besides Miss Lawson. Who was that other lady?

A. I don't know what her name was. We never found out. She was just another young woman in there. Maybe 24, 25 years old or something like that.

Q. But you didn't know her?

A. No, I didn't.

Q. Do you remember seeing a group of pictures this morning in my office?

A. Yes.

Q. Would you tell us what was said when you were given these pictures; what I said to you and what did the detective say to you? Detective Ore.

A. He asked me to look at the pictures and he said that the suspect was among the pictures and for me just to look at them and see if I could recognize anyone. I looked at them and picked out two faces that I thought could possibly have been the person. One I felt a little stronger about than the other because of the fact that he had a mustache.

Q. Did they have numbers?

A. They were numbers 6 and 7.

Q. That's numbers 6 and 7 from Government's Exhibit 1A [39] and B; are those the two that you pointed out in my office this morning?

A. Yes. This one and this one (indicating).

Q. Of those two, which ones—which of those two looked more like the robber?

A. I thought it would be Number 6 because he had the mustache. Both of them from what I could remember were possible.

Q. Would you describe what kind of a mustache the man who robbed you had—Did the man that robbed you have a mustache?

A. I really couldn't say. But I remember him having a mustache of some sort, right.

Q. Do you remember if it was a thick or a thin mustache?

A. No, I couldn't tell you for sure.

Q. In your opinion was it a prominent or not so noticeable mustache?

A. I noticed it, so I don't know. I wouldn't say it was really something that really stood out, but I do remember he had a mustache.

Q. Did you ever go to a police lineup?

A. No.

Q. Did you ever see any photographs of possible suspects before this morning?

[40] A. No.

Q. Please look around the courtroom and tell me if you can see in this courtroom the man who robbed you.

A. I can't really say. It would be hard for me to say outright that this is the man that robbed me. I'd have to say possibly. But I can't say I am absolutely sure.

Q. And by the man you made reference to, is that the defendant seated at counsel table?

A. He'd be the only one.

Q. So your testimony with respect to the man that's seated at counsel table is that you couldn't be sure?

A. I'd have to say—I really can't be positive, but he looks similar from what I remember. That's all I can say. He looks similar.

MR. BENNER: No further questions, Your Honor.

CROSS EXAMINATION

BY MR. McHALE:

Q. Miss Denner, what time did this incident occur on January 6th, do you recall?

A. About 3:00 o'clock in the afternoon.

Q. And when you went into the ladies room, how long had you been in there before someone followed you in?

A. I had just gone to the toilet. It was only two or three minutes after I'd gone in.

Q. When did you first notice the broken beer bottle?

* * * *

[48] MR. BENNER: Your Honor, I would call then, Mr. James Diggins to testify regarding the probable cause and the arrest.

MR. McHALE: Your Honor, the same objection.

THE COURT: I'll permit that at this time. You may call your policeman and then perhaps Mr. Diggins.

MR. BENNER: Very well, Your Honor. I would call Officer Rayfield.

Thereupon,

DAVID W. RAYFIELD,

having been called as a witness for and on behalf of the Government, and after having been first duly sworn by the Deputy Clerk, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. BENNER:

Q. Tell us your name, please.

A. David W. Rayfield.

Q. Are you an officer with the Park Police in Washington?

A. Yes, I am.

Q. Were you working on the 3rd of January of this year?

A. Yes, sir.

Q. Where were you working, sir?

A. At the Lincoln Memorial.

Q. Did there come to your attention, sir, that there was a robbery which was committed at the Washington Monument [49] area?

A. Yes, sir, there was a lookout broadcast at approximately 11:30 that there had been a robbery at the Washington Monument concession stand. The lookout was for a Negro male 15 to 18 years in age, slender built, wearing a V-necked T-shirt.

Q. Do you recall anything else about that lookout?

A. (No response.)

Q. Do you recall any other details that may have been broadcast concerning that lookout?

A. One factor that was brought out in the lookout was that the subject had a smooth complexion.

Q. Now, were you at work on the 6th of January?

A. No, the 6th was my day off.

Q. So you returned on the 7th; would that be correct—you returned to work on the 8th?

A. Yes.

Q. Did you hear any more about the crime on the 3rd or any subsequent crimes at the Washington Monument?

A. Yes. I reviewed—we have a complaint roster which contains the complaints which occur at the park, and at this time it is very slack at the parks and there aren't that much activity. And I am on the bicycle patrol, and we don't have an assigned area per se. We have pretty much freedom around the monuments. And I went through the [50] complaint records, and I looked through the complaint records for areas where I could best patrol and where I would be most needed. And I noticed another robbery had occurred at the Washington Monument concession on the 6th of January.

Q. And what did you learn about the robbery on the 6th?

A. That the subject that was being looked for in connection with this robbery had the same description and same MO as the previous robbery.

Q. Did you talk to any of your fellow officers concerning the robbery of either the 3rd or the 6th?

A. Yes. Station talk. We talked about the robberies. Everyone was aware they were happening, and most of the people in the District One area were aware that the robberies were taking place.

Q. In relation to those facts that you have already told us about, did you learn anything else about the alleged participants or perpetrators of the robbery on the 3rd and 6th by talking to your fellow officers?

A. No, I don't believe so.

Q. On the 9th of January were you at work on that day?

A. Yes.

Q. Do you recall an incident surrounding the arrest of a suspect on that day?

A. Yes.

Q. Would you tell us when you first noticed there was [51] a suspect around, and please describe to us what happened.

A. About 12:15 or 12:30 in the afternoon, I was at the Washington Monument concession on the west side having a cup of coffee. I observe a subject walking southbound on the south walk about 300 yards away from the monument concession stand. Officer Barg, another bicycle officer, was with me and we saw the subject walk south to the front of the monument concession stand and turn around and walk north and go into the men's room. The subject stayed in there about ten minutes, and at this time I observed a Mr. Dickens, a sightseeing guide, and I knew that he had seen a subject in the area of the monument concession on the day of the 3rd—the first robbery. So I asked Mr. Dickens if this subject looked familiar to him. At first he said, "I didn't get a good enough look." And I said, "Well, when he comes out of the restroom would you look at the subject and tell me if you can recognize him." As the subject walked north on 15th Street towards Madison Drive, Mr. Dickens said, "Yes, I believe that is the individual who was here on the day of the robbery."

Q. And what did you do after talking to Mr. Dickens?

A. At that time Officer Barg and myself approach the defendant in the area of 14th and Madison Drive—prior to this at the monument concession we approached him before Mr. Dickens identified him and ask him how old he was and [52] what was his name?

Q. Did he answer those questions?

A. Yes, he did. He had no identification, though.

Q. What did he say his name was?

A. Keith Crews, and he said he was 16 years old.

Q. On that first encounter before you talked to Mr. Dickens, did you have any encounter with Mr. Crews other than those two questions you just stated?

A. Well, there was more conversation. We asked him what he was doing in the area and wasn't he supposed to be in school. And he stated that he walked away from school. I believe Officer Barg told the defendant that we had been having some robberies in the area and he matched the description to some degree of the person we were looking for.

Q. How long did that first encounter last, officer?

A. Approximately three to five minutes. It was a very brief encounter.

Q. Then there came a second encounter after you talked to Mr. Dickens; is that right?

A. Yes. After Mr. Dickens said, "I believe this was the gentleman that was here on the 3rd," Officer Barg and I approached Mr. Crews again at 14th and Madison Drive, which is about a block and a half away.

Q. What took place when you approached him the second time?

[53] A. When we approached him the second time Detective Ore—Plainclothesman Ore who was handling the robbery case—I asked for him to respond to see what type of action he wanted to take since I knew he was working on the robbery case. At this time Detective Ore arrived and got out of his cruiser and attempted to take a photograph of the subject because he was a juvenile truant. It is our procedure to take photographs of all juveniles we deal with. The weather was extremely overcast and there was a light rain falling and the photograph did not turn out. So Detective Ore transported Mr. Crews to headquarters where he took a photograph—another photograph.

Q. How long did you detain Mr. Crews the second time until Detective Ore arrived?

A. Maybe ten or fifteen minutes.

Q. What happened during those few minutes.

A. Not very much. We just stood by and waited for Detective Ore to arrive.

Q. Did you tell Mr. Crews he was under arrest?

A. No.

Q. Would you tell us what the procedures of the Park Police and your procedure with respect to truants is. You've made several references to truants.

A. Well, when we come across an individual who is truant from school we take them to our headquarters and call [54] the school to confirm that they are in fact truant. And we call the parents of the juvenile and the parent usually tells us whether they want the juvenile brought home or taken back to school. In most cases we take the respondent back to school.

Q. Did you think, based on your descriptions—the description you had received of the robber and other conversations that you had—when you saw Mr. Crews did you think he was the person who committed the offenses on the 3rd and the 6th?

A. I had a suspicion that it was because the parks—at that time of the year the parks aren't really a tourist area and there aren't that many people around, and he was not certain where he was going when he arrived at the monument concession. As I stated, he walked south, turned around and walked north a little bit and then walked west and went to the men's area at the comfort station.

Q. Did you see him buy anything at the concession stand he went to?

A. No, sir. I watched him the duration of the time he was there except for a brief minute while he was in the comfort station, and he made no purchases.

Q. Were you in uniform that day?

A. Yes, sir.

Q. Did there come a time before you stopped Mr. Crews [55] that he appeared to notice you and your partner?

A. He could have noticed us. We were standing by the corner of the concession stand, and when he got up rather close we were visible to him. Whether he saw me or not I can't really say for sure.

Q. Could you tell us, officer, what conversation—what the conversation was that Mr. Dickens had with you? You say he told you something. What effect did that have on your actions?

A. That enforced my suspicions to believe that Mr. Crews was a possible suspect in this case.

Q. How long have you been a Park Policeman?

A. Four years July 27th.

Q. Were you in law enforcement before that?

A. Before that I worked for the Maryland State Police as an identification expert.

Q. Do you make many arrests for serious crimes in the parks in the course of your duties?

A. I've made a few. Serious crimes in the parks really aren't that prevalent. Mostly crimes like break-

ing into cars and that type of thing. By the time people discover their cars have been broken into the person responsible for the break-in is usually out of the area.

MR. BENNER: No further questions of this witness, Your Honor.

[56]

CROSS EXAMINATION

BY MR. McHALE:

Q. Officer Rayfield, on January 9th, the day that you did make this arrest and took Mr. Crews from the Washington Monument to the Park Police Headquarters, the only description that you had other than a clothing description was simply a Negro male 15 to 18 with a smooth face; is that right?

A. A slender Negro male, 15 to 18, with a smooth complexion, yes sir.

Q. And no distinguishing marks?

A. No.

Q. And no description of hairstyle?

A. No.

Q. And no description of complexion, just smooth?

A. I don't recall a description of his complexion.

Q. And you said Mr. Crews was picked up and processed as a truant; is that right?

A. Yes, sir.

Q. Which entailed your taking him to Park Police Headquarters and photographing him and calling the school and calling the parents.

A. Yes, sir.

Q. And when you stopped him and inquired of him his name and age he told you his name was Keith Crews and he [57] gave you his age as 16; is that correct?

A. That's correct.

Q. Are you aware of what the age for mandatory school attendance is in the District of Columbia?

A. I believe it's 16 or under 16, I'm sorry.

Q. I believe that you also testified that although Mr. Crews had been picked up and processed as a truant you did have some suspicion that Mr. Crews had been the robber who had been there previously; is that right?

A. There was a suspicion, yes, sir.

MR. McHALE: No further questions.

THE COURT: Step down, sir.

(Whereupon, the witness stepped down from the witness stand.)

THE COURT: Mr. McHale, you don't contend that a person can't be a truant who is over the age of 16, do you?

MR. McHALE: I certainly do, Your Honor. I think the statute is clear that anyone over 16 is legally not a truant, whether his parents want him in school or not may be a different thing. But there certainly is no cause for arrest over the age of 16.

THE COURT: All right. Call your next witness.

MR. BENNER: The Government would call Detective Ore.

Thereupon,

CARL L. ORE,

[58] was called as a witness for and on behalf of the Government, and after having been first duly sworn by the Deputy Clerk, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. BENNER:

Q. Please state your name and occupation, please.

A. Carl L. Ore. I'm a detective with the United States Park Police.

Q. How long have you been a detective with the Park Police?

A. Two years.

Q. Before that did you have any previous law enforcement experience?

A. Yes, sir, I did.

Q. Would you tell us what that is?

A. Three years at the jail. I worked there three years as a tactical squad officer and patrolman.

Q. Detective Ore, did you receive a notification on the 9th of January that two patrolmen of the Park Police needed your services?

A. Yes, sir.

Q. Would you tell us what time that was, about?

A. Approximately 11:30, I think it was.

Q. Did you get the message directly?

A. By telephone, yes.

[59] Q. What was the contents of the message?

A. The contents of the message was that the bicycle men had contacted a man in the 1400 block of Madison Drive and that he resembled the description that was given in a robbery lookout.

Q. Did you have knowledge of robberies that had taken place on the 3rd and 6th of January?

A. Yes, sir, I did.

Q. When you got to 14th and Madison, would you tell us what happened when you got there and who you talked with?

A. I attempted to talk with the young man and I also wanted to take a picture, but it was raining quite hard, and we couldn't interview him in the rain, so I ordered him—the men to take him to Park Police Headquarters for interrogation and processing.

Q. Why did you want to take a picture of this man?

A. Because he did match the description that was given of the lookout.

Q. Then your intent for this picture was to show it to the complaining witnesses; is that right?

A. Yes, sir.

Q. Did you make an attempt to take a picture on the scene?

A. Yes, sir.

Q. How many times did you try?

[60] A. Four times.

Q. Did any of those pictures turn out?

A. No, sir, they didn't.

Q. Based on what you know of these crimes and the description et cetera—I'll strike that question. Do you have any knowledge of the description of the assailant involved in the crime on either the 3rd or the 6th?

A. I had knowledge and do have knowledge of both dates, yes.

Q. From what you saw of the man who had been stopped on the 9th, what was your opinion as to his culpability or not in these crimes?

A. I thought he matched the description.

Q. Would you tell us what—would you tell us what the Park Police procedure is with respect to truants?

A. Yes, sir. If a young man was stopped in the park and thought to be a truant but who had no other criminal conviction we would take the suspect in custody, take him to Park Police Headquarters, and then call the school and then call the parents to see if they had knowledge of the fact that the individual was not in school. And whatever decision we get there we would make a decision.

Q. How long was Mr. Crews at Park Police Headquarters before he was released?

A. I'm not sure, but I would say around an hour or so. [61] I'm not really certain how long he stayed.

Q. Did you take a picture of him at this time at the station?

A. Yes, sir.

Q. Was he handcuffed while he was there?

A. No, he wasn't handcuffed.

Q. Do you recall if he was advised of his rights at any time at the station?

A. I didn't. As a matter of fact, I didn't place him under arrest.

Q. So as far as you are concerned, Detective Ore, he was not under arrest?

A. No. When a child is taken in for truancy he's not under arrest.

Q. Did you find out anything about his school status?

A. Yes, I did.

Q. Would you tell us what you found out?

A. I understand—as a matter of fact, I went to the school and got a letter to this effect, that on the 3rd and on the 9th he was not in school.

Q. When did you first find out on the 9th that he was absent from school?

A. I called the school on the 9th.

Q. Did you show pictures to Mrs. Lawson and Miss Owens of possible suspects?

[62] A. Yes. I showed the pictures to Miss Owens and of course, one of our other officers showed the pictures to Miss Anne Lawson.

Q. Did they identify those pictures, if you know?

A. Yes.

Q. And who were they identified as?

A. Mr. Keith Crews.

Q. Were you present at the lineup on January 21st?

A. Yes, sir, I was.

Q. Who if anybody was identified?

A. Mr. Keith Crews.

Q. By both ladies?

A. By both ladies.

Q. And just this morning did you show pictures to a Miss Sandra Denner, D-e-n-n-e-r?

A. Yes, I did.

Q. Whom if anyone did she identify?

A. She chose the picture—I think Number 6 which was Mr. Keith Crews.

Q. Did she pick out any other picture?

A. She said 6 or 7, and she said mostly Number 6 because of the beard—not a beard but a mustache. She remembered a mustache.

MR. BENNER: No further questions of this witness.

[63] CROSS EXAMINATION

BY MR. McHALE:

Q. Detective Ore, on January 9th, the date Mr. Crews was picked up and taken to Park Police Headquarters the only description you had of the robber other than a clothing description was Negro male, 16 to 18 years of age and slender built?

A. Slender built, that's right.

Q. Now, you say that Mr. Crews was picked up and processed as a truant. Is that the way the Park Police ordinarily process truants? Do you know under the law what the definition of a truant is?

A. I think so.

Q. And what is that?

A. Any juvenile who should be in school.

Q. Do you know what age—what the law specifies as the age limit for school attendance is?

A. Yes.

Q. What is that?

A. 16 years of age.

Q. So that anyone over 16 years of age could not be classified as a truant; is that correct?

A. May I explain this. Mr. Crews did not have any identification or anything else to indicate his age as being 16 years of age, and this is the reason why he was taken to [64] headquarters in order to further the interrogation. And this was what was done.

Q. Mr. Crews told the officers he was 16 years of age, didn't he?

A. I'm not sure about that, sir, I wasn't there.

MR. McHALE: No further questions, Your Honor.

MR. BENNER: No further questions.

THE COURT: You may step down.

(Whereupon, the witness stepped down from the witness stand.)

MR. BENNER: The only other witness I would have, Your Honor, and I realize this is taking quite a long time, but that would be Mr. Dickens. I would proffer to the Court that if Mr. Dickens testified he would state as I have said regarding the arrest part, that he saw the man on the 3rd and he talked to the police officers and indicated that he thought that was the man who was there on the 3rd. If the Court would like to hear that testimony I'll put it on briefly.

THE COURT: I'll accept the proffer. Do you object to the proffer by the Government?

MR. McHALE: I don't object to the proffer but I object to the in-Court ID which Your Honor has already ruled on. I have no objection to the proffer made by the Government.

THE COURT: You do not object?

MR. McHALE: I do not object to that proffer, no.

* * *

[TESTIMONY OF KEITH CREWS]

[79] Q. What else did you have in your wallet?

A. The three pictures that I had in there but I gave them to a girl. They were black and white pictures.

Q. Are these the three that you had taken at Murphy's?

A. Yes.

Q. So then you had the pictures in your wallet that you had taken at Murphy's?

A. Right, but I don't have them here. I don't carry pictures around.

Q. Did you tell the officers when they stopped you that you had cut school?

A. No, sir. I told them I came down to get some pictures and I showed them the three pictures I had.

Q. Did you tell the officers you went to Shaw?

A. Yes, sir.

Q. Did you tell them you went there on that day because you had left the school?

A. Yes, sir.

Q. So then you told them you cut school, didn't you?

A. I told them I was going to get some pictures taken. I told them what time I left the school.

Q. Detective Ore tried to take a picture of you when he came up to you, didn't he?

A. Yes, sir.

Q. Did you care if he took that picture of you or [80] not?

A. Well, he told me to stand by the tree and I let him take a couple of pictures. I don't know if they came out or not. I just stood there and he took a couple of pictures.

Q. Did you ever tell him that you wanted to go and you didn't want to stand around there and have him take your picture?

A. No, I never said that.

Q. Didn't you tell them that you wanted them to leave you alone and you didn't want the police messing with you and you wanted them to go about their business?

A. No, I never said that.

Q. Did you mind that the police stopped you and talked with you?

A. Did you mind?

Q. Yes, did that bother you?

A. I had no idea they was going to stop me.

Q. Did the Park Police seize any identification from you or take anything from you?

A. They didn't take it from me, I gave it to them and they gave it back to me.

Q. Did they take anything from you?

A. They didn't take nothing from me.

Q. Did they take a watch from you?

[81] A. Yeah. After I got down to the station they took a watch and keys.

Q. You cut school on the 3rd of January too, didn't you?

A. I didn't cut school. I was in the basketball court playing basketball.

Q. But you weren't signed into any of your classes on the 3rd, were you?

MR. McHALE: Object, Your Honor.

MR. BENNER: That was another date, Your Honor. I was referring to the 3rd.

MR. McHALE: I think that's beyond the scope of direct, Your Honor. He can get into that during the trial.

MR. BENNER: One other question if I may.

BY MR. BENNER:

Q. I notice on the back of your library card it is written in in pen like a person's handwriting. It's written in your birthdate.

A. Yes, sir.

Q. When was that written on there?

A. When I first got my library card.

Q. Who wrote it on there?

A. The lady at the place.

MR. BENNER: No further questions, Your Honor.

THE COURT: You may step down.

* * * *

[97] MR. McHALE: Yes, Your Honor. As to the point—the defense's position, Your Honor, is that there was an intervening suggestive lineup and that any in-Court identification is inevitably the recollection of the initial lineup rather than the events that were testified to. That is the sort of thing that can taint an in-Court identification.

THE COURT: Are you saying that in all probability a young lady would be unable to identify an individual who faces her with a gun in a toilet stall if she sees him only for the second time in a Court of law? Is that what you're saying to me?

MR. McHALE: Your Honor, what I'm saying is that the problem with these situations is that if there is an intervening lineup that the recollection of the identification may be back to the person she picked out during the improper lineup rather than back to the initial incident. I'm suggesting that may be the case here. She's recollecting not the person she saw on the date of the robbery but she's recollecting the person she saw at the lineup. I think the cases are clear that there is a possibility that an intervening suggestive identification can taint an in-Court identification. And that even though the testimony might be this is the person, that the subtle influence of the suggestive intervening identification is such as to taint an in-Court identification. Without arguing any further, [98] my recollection of the proffer with regard to Mr. Dickens was not that he positively identified Mr. Crews as the person who was there on the 3rd, but rather there was something said about he looks like the man. As to that, we didn't dispute the fact that he would have said Mr. Crews looks like the man. Also as to Mr. Benner's cite regarding the *Adams* case, *Adams* did not deal with probable cause because probable cause was not raised, and the Court in its opinion did not deal with it. I would urge Your Honor in addition to deciding the suggestivity aspects of this to consider the probable cause aspects and the improper police procedure which brought Mr. Crews into the system initially, which we said we would suggest would cause all of the subsequent identifications to fall. That's a separate issue from the testimony of the complaining witnesses.

THE COURT: All right, gentlemen. We'll recess for a few minutes at this time.

(Whereupon, the proceedings were recessed at approximately 3:10 o'clock p.m.)

(Whereupon, the proceedings were resumed at approximately 3:18 o'clock p.m.)

THE COURT: With respect to the motion to suppress identification testimony filed herein and in consideration of the Government's opposition to the defendant's motion to suppress, the Court makes the following finding.

[99] FINDING OF THE COURT

THE COURT: Number one. That there did not exist probable cause for any arrest of the defendant, Keith Crews by the United States Park Police on the date in question. That the photo identification taken by the United States Park Police as well as the lineup photo identifications will be suppressed.

Secondly, the Court is of the opinion that there does exist a factual basis for an in-Court identification of the defendant, Keith Crews in that it has been sufficiently established from the testimony of witnesses presented by the Government so that the in-Court identification will be permitted. That is to say that the complaining witness, Carol Owens may testify during the course of the trial as she testified on the motion to suppress as well as the complaining witnesses Ann Lawson and Sandra Denner.

Mr. Clerk, would you get the jury panel.

MR. McHALE: Your Honor, before the jury arrives and is empaneled, would Your Honor make a finding as to whether aside from the independent source whether the in-Court ID should be suppressed because of a subterfuge arrest.

THE COURT: The in-Court identification of the defendant by the two complaining witnesses will not—is not suppressed.

MR. McHALE: For either reason?

[100] THE COURT: Yes.

MR. McHALE: Thank you, Your Honor.

THE COURT: Is the ruling clear to you?

MR. McHALE: Yes, Your Honor.

THE COURT: Is it clear to you, Mr. Benner?

MR. BENNER: Yes, sir. With respect to Mr. Dickens, Your Honor, is your ruling—

THE COURT: I accepted your proffer. Now, I thought we had agreed. I'll have the Court Reporter read that back if there is any dispute about it because I don't want either one of you to be of the opinion that the Court has made a ruling that it has not made. I understand you to tell me that Mr. Dickens had observed the defendant when he was in the presence of other people out there in the hall or that some conversations had transpired without identifying really who, but I would not permit him to testify for that purpose. But I did tell you on your proffer that I would permit him to testify in the course of the trial as to the fact that he could independently identify—

MR. BENNER: I'm sorry, Your Honor, I didn't understand. Will he then be allowed to make an identification based on an independent source basis?

THE COURT: That's correct.

MR. BENNER: Thank you, Your Honor.

(Whereupon, the motion was concluded at approximately 3:25 p.m.)

* * * *

[106] PROCEEDINGS

THE DEPUTY CLERK: This is the case of United States versus Keith Crews, Docket Number 10258-74.

THE COURT: Mr. Benner, will you call your first witness.

MR. BENNER: The Government would call Miss Carol Owens as the Government's first witness.

Thereupon,

CAROL OWENS,

having been called as a witness for and on behalf of the Government, and having been first duly sworn by the Deputy Clerk, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. BENNER:

Q. Would you tell us your full name, please.

A. My name is Carol Owens.

Q. How old are you, Miss Owens?

A. I'm 19.

Q. Where do you live?

A. I'm a student at Wentworth College in Spokane, Washington.

Q. And what year are you in college?

A. Sophomore.

Q. Carol, were you in Washington, D.C. on January 3rd 1974?

[107] A. Yes, I was, sir. The school system I am in is called 4-1-4, which means one, the number one, stands for short term, and it is dedicated to studying one subject intensively. And there are opportunities for study tours. And I took a study tour here to Washington to study the Government firsthand.

Q. Do you remember in particular where you were on January 3rd at about 11:30 in the morning?

A. I was at the Washington Monument.

Q. And what were you doing? Were you just touring around?

A. I was just walking around.

Q. In particular, about 11:30, where did you find yourself?

A. Well, the comfort station.

Q. And where is that in respect to the Washington Monument?

A. Well, the Washington Monument is like on a hill and the comfort station is down towards the bottom of the hill.

Q. Would you tell us what happened when you got to the comfort station?

A. Well, I was just about ready to leave the stall when I saw two eyes peering—I was in the stall right next to the wall inside the comfort station when I saw two eyes [108] peering down through the crack where the door sort of meets the hinges by the wall.

Q. What did you do when you saw someone staring in?

A. I got frightened.

Q. Would you tell us what happened.

A. After that, the man—the person that was staring through the door put his hand over the door, and said, "Let me in." I said, "No, no, please don't." And then he asked for \$10. He said, "Give me \$10," and I lied to him. I told him I didn't have \$10, and he pointed a gun over the door, and I gave him the \$10 I did have. After that, he asked for \$10 more. At this time I honestly didn't have it and I offered him a Traveler's Check and he said, "I don't want no check." In order to prove I didn't have \$10 I showed him my purse and he climbed up—he stood on the toilet in the stall next to mine. And he looked into my purse and I showed him my purse and the inside of my wallet. And after that, after realizing that I didn't have \$10 he again asked for entrance into the stall. And at this time, after seeing the gun twice, I let him in the stall. Then the facts get kind of cloudy right here. I don't remember exactly the chronological order of how things happened. First, he kind of motioned towards his zipper, and the first thing I asked him was not to rape me. I was really scared he was going to rape me. Then—Let's see. I believe he reached for the [109] hem of my dress and indicated he wanted to see under it. I was wearing a long dress on that day, and I pleaded with him, "No, no, please don't." And he asked me if he could feel my breasts, and I still was really scared he was going to hurt me if I didn't let him do anything, so I let him feel my breasts. So he got up on my lap, sort of and he felt my breasts. Then he asked if he could suck them. He reached toward my blouse and I said, "No, no, please don't." He reached for his zipper again and said would I suck his penis and I said, "No, please don't make me do that." And I think after that I pleaded with him to leave. So then he left saying, "You better stay here for twenty minutes or I'm going to shoot you." So, like he left the stall, and I stayed there for like five or ten minutes and then I immediately ran to where my friend was and told him that I had been robbed.

Q. How much money did this person get from you?

A. Ten dollars.

Q. What was the first time that you had a good look at this person in the comfort station?

A. The first time I really got a good look at his face was when he climbed up on the toilet in the stall next to mine.

Q. And for how long a period was he standing on the toilet next to you?

[110] A. Oh, a couple of minutes, I guess. One or two minutes.

Q. How long did it seem to you that he was inside the stall with you?

A. For three or four minutes.

Q. Would you describe what this man looked like.

A. He was about five five or five eight. I kind of guessed how tall he was by where his head came in relationship to the door. I was just about as tall as the door was so like he came down about that much (indicating).

Q. What else can you tell us about him?

A. He was really dark; darkly complected and had a smooth complexion like he wasn't old enough to shave yet. I didn't see any razor stubble or anything like that. He didn't have any wrinkles around his eyes. I can't really describe his eyes. They seemed kind of big.

Q. Did you form an opinion as to how old he was?

A. I surmised that he was about 15 or 18 years old.

Q. What kind of clothes was he wearing?

A. I remember him wearing a ski-neck sweater with a T-shirt, and kind of a sloppy raincoat type of deal. It seemed to me to be sort of a raincoat. And jeans. And his pants I think were dark, although I don't believe they were Levi's.

Q. Did you notice his hair?

[111] A. He was wearing a pea cap or wool cap covering his hair.

Q. Did you get a chance to have—did you get a good look at the person, his face, very long?

A. I got a very good look at this person.

Q. Do you remember what he looks like?

A. Yes, I do.

Q. Do you have a picture of what he looks like in your mind?

A. Yes, sir.

Q. How long did the whole incident take place from the time the person came first in the restroom until the end?

A. Five or ten minutes, I would say.

Q. What kind of lights are inside the comfort station?

A. I don't really remember what type. I think they were fluorescent, but they were a little bit darker than this, but not very much so.

Q. Would you like around the courtroom and tell me if the person who robbed you on January 3rd is presently in the courtroom.

A. Yes, sir, he is.

Q. Would you point to him please.

A. That man sitting over there (indicating).

Q. Would you tell us for the record, what is he [112] wearing right now.

A. He's wearing—I don't know what kind of material that is, but it's kind of a sweater or a deal with a white collar. It's kind of a blue and striped.

Q. I ask you to take a good look at this man's face right now. Is there any doubt in your mind that that's the man that robbed you?

A. Sir, there's absolutely no doubt in my mind that this is the man that robbed me.

MR. BENNER: No further questions, Your Honor.

THE COURT: The record will show the witness identified the defendant. Mr. McHale?

MR. McHALE: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. McHALE:

Q. Miss Owens, if I understand your testimony correctly, you went to the bathroom at the Washington Monument and had been in the stall for a few minutes when this person came into the bathroom after you; is that right? He was following you?

A. Yes, sir.

Q. You say the first conversation you had with him was when he stuck a gun over the top of the door.

A. No, sir, that's not correct.

Q. When was the first conversation you had?

[113] A. The first conversation I had with the gentleman was when he stuck his hand over the door and asked to be let in to the stall.

Q. At that time you said you refused and you wouldn't let him in; is that right?

A. That's correct, sir.

Q. Was it at that point that this person stuck the gun over the door?

A. No, sir, that's not correct.

Q. At what point did the gun appear?

A. After he asked me for ten dollars.

Q. During this period of time when he stuck his hand over the door and asked you for money, you and he were talking through the stall door; is that correct?

A. That is correct, sir.

Q. And at the time you were speaking with him you couldn't see him.

A. At that point in time, yes, sir.

Q. How many minutes or how many seconds were you and he talking about him trying to get money before you saw a gun?

A. One or two, I guess. Not any more than that.

Q. And then a gun appeared and the gun was pointed over the top of the stall?

A. That's correct, sir.

[114] Q. At this point the person was still behind the closed door; is that correct?

A. Yes, sir.

Q. And he again asked you for ten dollars and you at that point gave it to him?

A. After I saw the gun, yes, sir.

Q. How did you give it to him? Did you hand it over the door?

A. Yes, sir.

Q. And it's at this point that this man then goes from behind—or from your vantage point behind the closed door to the next stall and climbs up onto the toilet.

A. Yes, sir, that's correct.

Q. Of course, when he's standing on the toilet in the next stall looking down you couldn't have any idea how tall he is; is that correct?

A. When he was standing on the toilet, yes, sir. I didn't have any idea.

Q. And then he has a further conversation with you at that point about more money?

A. Not exactly, sir. He asked me for the money before he got up on the toilet.

Q. Now, when he is on the toilet looking into the stall at you, how far in feet would you say the distance is between you?

[115] A. Would you please repeat the question?

Q. I'm sorry. How far away from you was he when he was standing in the adjoining stall on top of the toilet?

A. I can't give you an accurate measurement. I'd say my head was about here and he was about there (indicating).

Q. Would you say two to three feet?

A. I guess that's about two feet, yes, sir.

Q. How long was he standing on top of the toilet looking down into your stall before he got down and went back?

A. No more than one or two minutes. Just enough time to look through my purse and look in my wallet.

Q. Did you hand these things to him?

A. No, I didn't.

Q. You opened your purse and showed it to him; is that correct?

A. Yes.

Q. So at least part of the time he's standing up on top of the toilet looking down at you and looking at your purse, and you're showing him that you don't have anything in your purse; he's looking at your purse?

A. Not exactly, sir. I opened up the purse before he climbed up on the stall.

Q. And then did you hold it up and show him there's nothing in it?

[116] A. My purse and my wallet, yes, sir.

Q. And then this person gets down from the toilet and goes down back in front of the stall; is that correct?

A. Yes.

- Q. And then he demands entry into your stall?
 A. Yes.
 Q. And it's at that point that you let him in?
 A. Yes, sir, I did.
 Q. And when he gained entry I think you said at one point he sat on your lap?
 A. Yes, sir, that's correct.
 Q. Were you in the toilet stall—were you seated or standing?
 A. I was seated.
 Q. So that any height comparisons you made of him would be from your vantage point while he was standing over you?
 A. Yes, sir, that's correct.
 Q. I believe you testified he comes in and at one point he reaches for his zipper and you plead with him. Then he sits on your lap. At the point he is sitting on your lap were you just within a few inches from him?
 A. Yes, sir.
 Q. And I think you described his face as being very smooth and no wrinkles and no facial hair at all. You said [117] he looked like he wasn't even old enough to shave; is that right?
 A. I was surmising the facial hair around here (indicating).
 Q. You were surmising?
 A. I was making my judgment. I was making a judgment from it was like he was standing up in front of me.
 Q. Let me make sure I understand. When he was seated on your lap were you face to face with him?
 A. No.
 Q. So at the point he sat on your lap you turned your face away from him; is that right?
 A. That's correct.
 Q. How long did that part of the incident last?
 A. A matter of seconds, sir.
 Q. So the only time you really saw his face was while he was in the adjoining stall and when he first entered your stall?
 A. That is not correct, sir. He stood in front of me for at least two minutes.

- Q. He stood in front of you? You mean when you were both inside the toilet stall?
 A. That is correct, sir.
 Q. Now, you were close enough to him to look at him and had he had a mustache or beard you would have noticed it, [118] wouldn't you?
 A. If it was very very pronounced I would have noticed it, yes.
 Q. You're not sure when you say he was clean-shaven?
 A. I'm starting to get a little confused. Would you repeat that?
 Q. I'm sorry. I understand your testimony to be on direct that he had a very smooth face and that he had no facial hair. In fact it looked like he wasn't old enough to shave. Are you saying now that you're not sure that he may have had some facial hair?
 A. I didn't notice any at the time.
 Q. I believe you also testified that he was very dark complected; is that right?
 A. That's correct.
 MR. McHALE: No further questions, Your Honor.
 MR. BENNER: If I may on redirect, Your Honor?

REDIRECT EXAMINATION

BY MR. BENNER:

- Q. How long a period of time would you tell us that you saw Mr. Crews when he was standing on the stall, up over the stall at the time you were looking at his face?
 A. You mean when he was standing on the toilet?
 Q. Yes.
 A. I'd say a couple of minutes while he was looking [119] over into my stall.
 Q. How long was it that he was standing inside the stall with you before he sat on your lap?
 A. About three or four minutes.
 Q. How long was it when he was on your lap?
 A. Just a matter of seconds.
 Q. Did you notice the man that committed this offense. Did he have any beard? By that I mean—I don't mean was it a grown out beard but did he have a shaved beard?
 A. No, sir, he did not.

Q. Did you notice if he had a mustache?

A. I didn't notice a mustache.

Q. Would you have noticed if he had a mustache like mine, a long one?

A. Undoubtedly I would have, yes.

Q. Would you have noticed if he had a light mustache? The kind of mustache some young men have?

A. I honestly don't think I would have noticed that, no.

Q. Take a look at Mr. Crews right here in the courtroom (indicating). How would you describe, looking at him, his skin color? What is your opinion as to what his skin color is?

A. Very dark.

Q. Is that what you mean by very dark when you [120] described the man that robbed you?

A. Yes, sir. Very dark complected.

MR. BENNER: No further questions.

THE COURT: You may step down.

(Whereupon, the witness stepped down from the witness stand.)

MR. BENNER: I would ask that she remain, Your Honor. The Government would call as its next witness Mr. James Dickens.

MR. McHALE: Before Mr. Dickens enters, may we approach the bench?

THE COURT: Yes.

(Whereupon, counsel for both sides approached the bench and conferred with the Court, as follows:)

MR. McHALE: Your Honor, yesterday at the suppression hearing you indicated that Mr. Dickens could—after accepting Mr. Benner's proffer regarding the probable cause, you indicated Mr. Dickens could not make an in-Court identification. It seems to me, Your Honor, that at this point testimony by Mr. Dickens can only indicate to the jury that there is an in-Court identification, and probable cause is not before this jury. That has already been ruled upon.

MR. BENNER: I must have misunderstood your ruling. As I recall the witness will be allowed to make an

in-Court identification. I'm not going to put him on except to make an in-Court identification. I thought that was your ruling.

* * *

[122] THE COURT: Are you self-employed?

THE WITNESS: Yes, sir.

BY MR. BENNER:

Q. Where do you live, Mr. Dickens?

A. I live in Prince Georges County in Maryland, sir.

Q. How long have you had this job as a sightseeing guide?

A. This is my 21st year.

THE COURT: Are you licensed?

THE WITNESS: Yes, sir.

BY MR. BENNER:

Q. You are licensed by the D. C. Government as a sightseeing guide; is that correct?

A. Yes, sir.

Q. Do you remember where you were on Thursday, January 3rd 1974? Were you working as a sightseeing guide that day?

A. Yes, sir.

Q. Where were you working?

A. I arrived at the Washington Monument about 11:15 and parked my car over on Madison Drive and I walked over in the area of the Tourmobile. I don't know if you're familiar with that area, but that's on 15th Street between Independence and Constitution.

[123] At some time that day, Mr. Dickens, did you talk to the Park Police about a robbery that had taken place?

A. They talked to me, yes.

Q. Will you tell us what conversation took place.

A. They asked me if I'd seen anyone standing around, and I told them that I had seen one person since I had been there standing around.

Q. Did you tell them what this person looked like or did you point him out?

A. I said I could point him out.

Q. Did you point him out on that day? Or was he still around?

A. I described the clothing he was wearing on that day to the best of my knowledge when they asked me about him. I described his clothing.

THE COURT: What do you mean by standing around?

MR. BENNER:

Q. Mr. Dickens, what do you mean by standing around?

A. Well, there are two information booths in that area of the Washington Monument near the souvenir shop. One I'd say is about 35 or 40 feet from the souvenir shop, and the other northward toward Constitution about a hundred yards farther. This person was standing in the area of the other information booth. That would be the one closest to Constitution Avenue.

[124] Q. Now, where is this concession stand? Where are they in relation to the comfort station?

A. The front of the building is a souvenir shop on—on the north side there's a men's restroom and on the south side is a ladies' room. And in the very rear is a refreshment stand. But it's all in the same building.

Q. Was there any particular reason why you happened to notice this particular individual standing around?

A. Well, he resembled someone that I knew.

Q. Who's the person he resembled?

A. A young fellow named Harry Fleming, Jr.

Q. How do you happen to know Harry Fleming, Jr.?

A. Well, I knew him—he worked in the Washington Monument when he came out of school a few years ago, and his father is a very good friend of mine who is also a sightseeing guide.

Q. How long have you known Mr. Fleming, Sr., and his son?

A. I knew Mr. Fleming about 21 years, and his son, I would say, I've known about four or five years.

Q. How old is Harry Fleming, Jr., do you know?

A. I would imagine he's about 24 or 25 at this time.

Q. And the man that you saw at this time, was that Harry Fleming, Jr.? The man that you saw on that date?

A. No.

[125] Q. Would you tell us about that, Mr. Dickens?

A. The young fellow I saw, he passed me on that day. And I spoke because he resembled the young man that I knew. But he didn't speak back. And so I looked and I knew that it was someone else because he was much shorter than the other boy that I knew.

Q. Do you know who this person that you saw on January 3rd was? Do you know him?

A. Yes, I think I do.

Q. Is he in the courtroom today, Mr. Dickens?

A. Yes, he is.

Q. Would you point him out, please?

A. That's the young fellow, right there (indicating).

Q. And where was he when you saw him on January 3rd?

A. He was standing at the kiosk. We call it the kiosk. It's those little buildings there that afford shelter when it's windy. He was standing real close as if he was waiting to be picked up or something.

Q. How long a period of time did you see him on January 3rd?

A. I would say about ten or fifteen minutes.

Q. What time of the day was this?

A. Between 11:15 and 11:30.

Q. And where was he on that day when you last saw him?

A. Well, he passed me and went southward. I never [126] paid any attention to him after I spoke and he didn't speak to me. I saw he was much shorter than the person, and a little younger.

Q. I notice, Mr. Dickens that you have one eye that's bad; is that right?

A. Yes. I'm blind in the left eye.

Q. How long have you been blind in that eye?

A. Since 1950.

Q. How about your right eye; how does that function?

A. I have excellent vision in my right eye.

Q. Do you know how it was rated; how the doctors rated your other eye?

A. 20/20.

Q. Will you take a good look at the gentleman seated right here. Can you see him from where you're sitting?

A. Yes, I can see him.

Q. You're sure that's the same person who you saw on January 3rd?

A. Almost positive.

MR. BENNER: No further questions, Your Honor.

CROSS EXAMINATION

BY MR. McHALE:

Q. Mr. Dickens, you came into Court yesterday morning; is that right, to be a witness in this case?

A. Yes, sir.

* * *

[132] Clerk, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. BENNER:

Q. Please state your full name, Miss Denner.

A. Sandra Denner.

Q. Is it Miss or Missus?

A. Missus.

Q. Where do you live, Mrs. Denner?

A. Manchester, Maryland.

Q. And where is that in relation to Washington?

A. It's about 80 miles northeast of here.

Q. Are you employed, Mrs. Denner?

A. No, I'm a mother.

Q. Were you in Washington on January 6th of this year, 1974?

A. Yes, I was.

Q. Who did you go to Washington with?

A. I came with my husband, my brother-in-law, and his girlfriend, Ann Lawson.

Q. And what brought you to the city on that day?

A. We came to go to the Smithsonian Institute.

Q. At about 3:00 o'clock in the afternoon, do you recall where you were?

A. About that time I was in the rest station there at the bottom of the hill below the Washington Monument.

[133] Q. Would you tell us what happened.

A. Well, Ann Lawson and I went to the ladies' room, and I was finished using the toilet and was washing my hands in the wash basin. And someone came in behind me and put their arm around my neck and shoved something hard into my back and asked me to give him ten dollars. So I looked up into the mirror and I said, "I'll give it to you." And I reached to try to get the money out of my purse. At that point, he let go of me—he let go of my one arm while I tried to get the money out of my purse. I didn't have ten dollars. I had a twenty dollar bill, so I gave him that, and he at that time showed me that he had a broken beer bottle in one hand and threatened me with that, and said,—he put it up against my stomach and told me to get my friend to come out of the toilet. She was still in behind the door there. So I asked Ann to come out and she came out, and he asked her for her money, and she said she didn't have any and showed him that she didn't have any money. And there was another girl in there, too. And he asked her to come out and she refused to come out. So at that point he started to leave and he told us not to come out for twenty minutes, that he would be waiting for us if we did. So it was about two minutes later when another girl came in and we asked her if there was anybody waiting out there and she said no, so we left at that time.

[134] Q. Where was your husband and brother-in-law at that time?

A. They had taken the car to park it on the mall.

Q. How long a period of time was it that this person was in the comfort station with you?

A. It was a very short time. Maybe five minutes.

Q. Did you get a look at the person who robbed you?

A. I saw him—I could see his face in the mirror and I also saw him when I turned around to get my money.

Most of my attention, though, was on the broken beer bottle. But I did look at his face.

Q. How long a period of time did you get a chance to look at him?

A. I might have been able to—you know, really look at him for about half the time. I wasn't really watching him, though.

Q. What did the person look like that you can recall?

A. He was a young Black man and he had on a watchcap. And he had a round face, as opposed to a long type face. I remember that. And I think he was wearing a dark jacket at the time. He was just a few inches taller than I am. I'm about five four, so he was about five seven. He didn't seem to be particularly heavy or particularly thin, he was just medium built. I couldn't see much of his hair. I could see a little bit of hair sticking out below the watchcap. [135] It wasn't a real long hairdo, but it wasn't really long—his hair wasn't, but it wasn't particularly short either. I remember him also as having a mustache, too. But other than that there was nothing particularly distinguishing about his features.

Q. How old a man was he?

A. At the time I thought he might have been 20 or about that age.

Q. What kind of a mustache did he have?

A. It wasn't a very full mustache, but it was a mustache. I noticed and remembered that he had a mustache.

Q. What actually did this person take from you?

A. He just took a \$20 bill.

Q. Do you think you would be able to recognize that person if you saw him again?

A. I'd have trouble pinpointing exactly that person because I really wasn't concentrating that much on his features. Like I said, I could probably narrow it down to certain people I think it's not, but I couldn't point out the person exactly.

Q. Would you take a look around this courtroom and see if you see the man who robbed you.

MR. McHALE: Objection, Your Honor. She's already stated she couldn't identify the man. I think the only person here that's sitting here who she could reasonably point out [136] would be Mr. Crews. And she has already stated she couldn't do that.

MR. BENNER: We already had a hearing on this yesterday, Your Honor. This is not going to bring out—

THE COURT: I think both of you know what the witness is expected to answer. You've heard it before and you may answer, madam.

THE WITNESS: I'd have to say that the person who looks closest to this person would be the defendant.

BY MR. BENNER:

Q. Would you take a good look at the defendant, and by the defendant I mean this gentleman sitting right there (indicating). Please take a close look at him. Does he look in any way significantly different from the man that robbed you?

A. No. He doesn't look significantly different except for the fact that the man who robbed me had a watchcap on and his hair appeared obviously differently. But his facial features—like I say, he could be the man that robbed me.

Q. Exactly what do you mean by a watchcap?

A. A knit cap that you sort of pull down. I guess it's a pea cap.

MR. BENNER: Your Honor, for the record, I would state that there are 1, 2, 3, 4, 5 other young Black men in the courtroom aside from the defendant who are seated in the [137] spectator area.

BY MR. BENNER:

Q. Do any of those other men, Mrs. Denner, resemble the man that robbed you?

A. Not as closely as the defendant.

Q. So you would say of all the young Black men in this courtroom the defendant looks most closely to the person that robbed you?

A. Most like the person, yes.

Q. How would you describe, if I had asked you—my question would be, what is your degree of certainty or not as to the identification of the defendant? What would you tell us your degree of certainty is?

A. I would have to say I can't say this is the man for sure, but he looks like what I remember. He's as close as any people I've seen. That's all I can really say for certain.

MR. BENNER: No further questions.

THE COURT: Mr. McHale?

CROSS EXAMINATION

BY MR. McHALE:

Q. Mrs. Denner, do you recall speaking at various times with Detective Noland from the Park Police?

A. I think I talked to him on the phone.

Q. Do you recall talking to him over the phone within two or three days after this incident occurred?

* * *

[143] 10:45 o'clock a.m.)

(Whereupon, the proceedings resumed, with jury, at approximately 10:55 o'clock a.m.)

MR. BENNER: Your Honor, the Government would call Miss Ann Lawson.

Thereupon,

ANN L. LAWSON,

have been called as a witness for and on behalf of the Government, and having been first duly sworn by the Deputy Clerk, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. BENNER:

Q. Please state your full name.

A. Ann Louise Lawson.

Q. How old are you, Miss Lawson?

A. 20 years old.

Q. And where do you live?

A. Parker Road, Freeland, Maryland.

Q. And what do you do in Freeland, Maryland? What is your job?

A. I'm a mold machine operator at Black and Decker.

Q. And did you come to Washington on January 6th with some of your friends?

A. Yes, I did.

Q. Who did you come with and what were you doing?

[144] A. I came with my boyfriend and his brother and Sandra Denner. We came to visit the Smithsonian Institute.

Q. Did Mrs. Denner's husband come along?

A. Yes, he did.

Q. What time did you get to Washington that day, do you know?

A. I guess it was a little before 3:00.

Q. And where did you go when you got here?

A. To the comfort station at the Washington Monument.

Q. Is that the very first place you went?

A. Yes, sir.

Q. Would you tell us what happened when you got there.

A. Mrs. Denner and I went into the bathroom, and a few moments after we went in there, we went to wash our hands, and a man entered the bathroom and asked for money. And told me to come out of the stall. When I came out he asked me for money also and told us then to wait for 20 minutes, and then he left.

Q. How long did you spend in the bathroom before the man came in?

A. It was only a few moments. It wasn't very long.

Q. Where were you actually at when this gentleman came in?

A. I was in the stall.

Q. What's the first thing that alerted you to the fact [145] that someone else was in there? Did you hear anything?

A. I heard a man's voice.

Q. Did you hear him say anything?

A. I thought I heard him ask for money of Mrs. Denner.

Q. Did you hear Mrs. Denner reply?

A. She said to take everything that she had.

Q. Where were you when all that was going on?

A. I was in the stall at the time.

Q. And how far were you away from the point that Mrs. Denner was?

A. Well, from myself to about where the defense attorney is there (indicating).

Q. About ten feet or something?

A. Yes, sir.

Q. How long was this person with Mrs. Denner before you came out of the stall?

A. It wasn't too long.

Q. Was it just a matter of minutes or longer?

A. Just a matter of minutes, I guess.

Q. Did you get a look at the person when you came out of the stall?

A. Yes, I did.

Q. Did you see him at any time before you came out?

A. No, sir.

Q. What did the person look like that you saw in the [146] bathroom on that date?

A. He was about a little taller than myself and a Black man. He had on a dark colored pea cap and a dark colored coat. And he had a beer bottle in his hand. He was very dark complected and smooth skinned.

Q. How tall are you?

A. I'm five foot four.

Q. What did the man do when you came out of the stall?

A. He asked me for \$20 and pointed the beer bottle at me. He had ahold of Mrs. Denner and they were both facing me.

Q. What kind of light was there in the comfort station?

A. Well, it was brighter than it is in this room now.

Q. It was brighter than this?

A. Yes.

Q. How about the day itself; was there any daylight in there at all?

A. I believe so, yes. I'm not positive about that. But I know it was very bright in there.

Q. What if anything did this fellow do after he got the money?

A. Well, I showed him I didn't have any money with me at the time. And he told me to wait 20 minutes before leaving the restroom, and then he left. A few moments later we left.

Q. How long would you say it was, if you could tell us, [147] that you were outside of the stall and looked at this fellow?

A. Well, maybe five minutes.

Q. And during this time did he do anything else other than ask you for money?

A. No.

Q. Did he go through your purse?

A. No, he didn't touch it.

Q. How did you show him you didn't have any money?

A. Well, I started to hand it to him and he wouldn't take it so I opened it up myself and took some of the things out. Then I opened my wallet and showed him that I didn't have any money at all.

Q. Do you think you'd be able to recognize that man again if you saw him?

A. Yes, I do.

Q. Did you feel that you would be able to recognize him after he left the bathroom? Did you have a picture of him in your mind at that time?

A. Yes, sir, I did.

Q. Did you get a good look at his face or not?

A. Yes, sir. My face was directly towards his.

Q. Please take a look at the people in the courtroom and tell us if you see the man that robbed you.

A. Yes, sir.

Q. Where is he?

[148] A. Sitting right there in the blue shirt (indicating).

Q. You can recognize him from where you are standing now?

A. Yes, sir, I sure can.

Q. Is that the man that robbed you?

A. Yes, sir.

Q. Is there any doubt in your mind that that's the man that robbed you?

A. No, sir, there isn't.

MR. BENNER: May the record reflect that the witness has identified Mr. Crews.

THE COURT: The record will show that the witness identified the defendant.

MR. BENNER: No further questions.

CROSS EXAMINATION

BY MR. McHALE:

Q. Miss Lawson, when you first reported this robbery, part of the description of the man you say robbed you was that you guessed his age at somewhere around 22 or 23.

A. Not older than 22.

Q. Not older than 22 or 23.

A. Yes, sir.

Q. You described him as very dark complected?

A. Yes, sir.

Q. Now, when this person or this robber came into the [149] Washington Monument bathroom where you were, you were inside of the stall and couldn't see him when he entered; is that right?

A. Yes, sir, that's right.

Q. And he was having a conversation with Sandra Denner and you couldn't see him at that time; is that right?

A. Right.

Q. Now, when you were ordered to come out of the stall, did you immediately notice the broken beer bottle?

A. Yes, sir.

Q. How was this person holding it? Was he pointing it at you?

A. Yes, he was pointing it like this (indicating).

Q. Have you ever been robbed before with any kind of weapon?

A. No, sir, I haven't.

Q. I assume you were very frightened about this; is that right?

A. Yes, sir.

Q. Now, you described this person as being dark complected and having a very smooth face. That means clean-shaven, I guess?

A. Yes, sir. He had no beard. When I say clean-shaven I mean no beard like the United States Attorney has.

Q. What was the closest you got to this person at any point?

SUPREME COURT OF THE UNITED STATES

No. 78-777

UNITED STATES, PETITIONER

v.

KEITH CREWS

ORDER ALLOWING CERTIORARI

Filed February 21, 1979

The petition herein for a writ of certiorari to the District of Columbia Court of Appeals is granted.

CM

JAN 18 1979

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-777

UNITED STATES OF AMERICA,
Petitioner

v.

KEITH CREWS,
Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to Rule 53, paragraph 7 of the Rules of this Court, respondent requests leave to file his Opposition to the Government's Petition for a Writ of Certiorari to the District of Columbia Court of Appeals without prepayment of costs and to proceed In Forma Pauperis.

AFFIDAVIT

I, Silas J. Wasserstrom, being first duly sworn, depose and say in support of the Motion to Proceed In Forma Pauperis:

1. I am co-counsel for Respondent in the above-referenced matter and am a member of this Court.

2. Respondent was represented by court-appointed counsel from the Public Defender Service in this matter. I was appointed by the D.C. Court of Appeals to serve as Respondent's counsel at the appellate level.

3. Respondent is indigent and thus cannot pay the costs of this case, nor can he give security for the same.

Silas J. Wasserstrom
Silas J. Wasserstrom

Public Defender Service
451 Indiana Avenue, N.W.
Washington, D.C. 20001
628-1200

Subscribed and Sworn to by me
this 17th day of January, 1979.

Michelle J. Tucker
Notary Public, D.C.

Commission Expires January 31, 1983

753
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 78-777

UNITED STATES OF AMERICA,

Petitioner

v.

KEITH CREWS,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

SILAS J. WASSERSTROM

W. GARY KOHLMAN

Public Defender Service
451 Indiana Avenue, N.W.
Washington, D.C. 20001
628-1200

Counsel for Respondent

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1978

No. 78-777

UNITED STATES OF AMERICA,

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v.

KEITH CREWS,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The en banc opinion of the District of Columbia Court of Appeals is reported at 389 A.2d 277 (1978). It is reproduced as appendix A to the Petition.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on June 14, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the lower court was correct in excluding identification evidence which was the fruit of purposeful and flagrant police misconduct designed to obtain precisely that evidence.

STATEMENT

The respondent adopts the petitioner's statement of facts.

ARGUMENT

This is not an appropriate case for review by this Court. The District of Columbia Court of Appeals, sitting *en banc*, applied an unexceptional doctrine to a narrow and unusual set of facts. ^{1/} Its well-reasoned opinion is neither far reaching nor novel, and its analysis of the applicable legal principles is cogent, correct, and carefully tailored to the facts of the case before it. Indeed, contrary to the government's contention that its opinion conflicts with "several principles and lines of analysis" of this Court, the Court of Appeals' analysis followed precisely and perspicuously the guidelines which this Court has set forth in a series of decisions from Weeks v. United States, 232 U.S. 383 (1914); through Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Nardone v. United States, 308 U.S. 338 (1939); Wong Sun v. United States, 371 U.S. 471 (1963); Brown v. Illinois, 422 U.S. 590 (1975); United States v. Ceccolini, 435 U.S. 268 (1978).

The essence of the lower court's opinion is simply that where the police make a purposeful and illegal investigatory arrest specifically designed to secure the suspect's photograph for possible identification by the complainant, the deterrent rationale which underlies the exclusionary rule very well may -- and on the facts of this case indeed did -- require the exclusion of all subsequent identification evidence obtained as a result of that initial illegal arrest. ^{2/} The petitioner's

^{1/} Respondent adopts petitioner's statement of the question presented and recitation of the facts.

^{2/} The Court of Appeals' opinion several times repeats the theme that the exclusionary rule must be applied in this case because the police illegality was designed to obtain the very fruit now at issue. The very narrowness of that holding is a sufficient response to the petitioner's assertion that the opinion's rationale could apply "in every case that a court may later find the arrest to have been for some reason unlawful." Petitioner's petition at 10.

challenge to this conclusion is premised on two propositions, the first of which is not of sufficient importance to warrant certiorari review, ^{3/} and the second of which this Court effectively rejected just last term.

First, the government contends, the lower court was simply wrong in concluding that this particular in-court testimony was a fruit of the police illegality, though at times its argument seems to be that such testimony is never in fact a fruit. But at all events, the petitioner does not argue that in its analysis of this issue the Court of Appeals ignored the salient factors. Indeed, it could not; for the court below assiduously applied precisely the factors which this Court elucidated in Brown v. Illinois, *supra*. Consequently, the petitioner's complaint is, simply, that the court below accorded these factors different relative weight than the petitioner would like. Such a narrow issue is not worthy of review by this

^{3/} The petitioner argues that one reason for granting review in this case is that there is a "conflict" in the circuits on the question of whether in-court identification testimony can ever be the fruit of an illegal arrest. That alleged "conflict" is more asserted than demonstrated and, in any event, is not pertinent to this case.

In the first place, all of the cases cited by petitioner holding that in-court identification testimony was not a fruit of police misconduct were decided before Ceccolini, *supra*. They all seem premised on the notion that live testimony can never be the fruit of official misconduct, no matter how flagrant. This notion was dispelled by this Court's opinion in Ceccolini, *supra*. Moreover, to the extent that different courts, reviewing unique facts, have reached varying conclusions on the question of attenuation only reinforces respondent's argument that this is hardly an appropriate case for this Court's review. Indeed, one of the cases holding on a record analytically indistinguishable from the instant case that in-court identification testimony was a fruit of official misconduct has been cited with approval by this Court. United States v. Edmons, 432 F.2d 577 (2d Cir. 1970) (cited with approval in Brown v. Illinois, *supra*, 422 U.S. at 604, n.9)

(footnote cont'd on next page.)

Court; it is conceptually equivalent to a challenge to a finding of probable cause or no probable cause, wherein all the parties agree on the controlling principles, but disagree only on their application to the particular facts. Moreover, respondent submits, the weight accorded these factors by the court below was eminently reasonable.

As the court below pointed out, the Brown opinion "injected precision into the process of assessing attenuation," by delineating three factors which should be considered in determining whether evidence challenged as the fruit of police misconduct should be excluded. Those factors are: (1) the "temporal proximity" of the illegality to the alleged fruits, (2) "the presence of intervening circumstances," and (3) most significantly, "the purpose and flagrancy of the official misconduct." 422 U.S. at 603, 604.

Petitioner here concedes that there is a close "temporal proximity" between the illegality and the fruit. Petition at 18. As the Court of Appeals observed, the time from the illegal arrest to the in-court identification was "quite a brief period in the context of the criminal justice process," and, moreover, the illegality did not end on the arrest date but "tainted" the entire process." Petition at 39a.

(footnote 3 cont'd)

In any event, this case does not present the Court with an opportunity to resolve an arguable "conflict" in the circuits. Rule 19(1)(b) of the Supreme Court Rules, in setting forth considerations governing review on certiorari, discusses situations where "a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter. . . ." The District of Columbia Court of Appeals, however, is the equivalent of the highest court of a state, not of a federal court of appeals. Palmore v. United States, 411 U.S. 389 (1973).

The Court of Appeals then went on to consider whether there were "intervening circumstances" that might have attenuated the illegality, and persuasively distinguished Johnson v. Louisiana, 406 U.S. 356 (1972), on the ground that, unlike in Johnson, the illegally obtained evidence here was itself the basis for the allegedly intervening judicial determinations.

In Johnson, the illegality was related to the challenged fruit of it in only the most tenuous "but for" causal sense. The police had probable cause to arrest the defendant for crime A, but because the arrest was made in his home, it was arguably illegal because they had not secured an arrest warrant. After Johnson's arrest a magistrate found probable cause to hold him and ordered him to stand in a lineup. The magistrate's probable cause determination was not based on any illegally seized evidence. Johnson was identified at the lineup by a witness to crime B, and he contended that this lineup identification should have been suppressed as a fruit of the warrantless arrest for crime A.

This Court understandably rejected Johnson's claim, ruling that the alleged fruit -- the lineup identification -- was attenuated from the illegality by the "intervening circumstance" of the magistrate's probable cause determination and his lineup order. As the Court of Appeals noted below, the magistrate's finding of probable cause occurred after the arguable police misconduct. At the point of the lineup, in other words, Johnson was in custody not because of the warrantless arrest but because of the magistrate's probable cause determination. It is because of that crucial fact that this Court itself has cited Johnson as an example of an "intervening circumstance" that attenuated an alleged fruit. Brown v. Illinois, 422 U.S. at 603-604. Here,

however, the allegedly intervening circumstances which the government contends are comparable to the magistrate's order in Johnson, were, as the court below pointed out, themselves "afflicted with the very infirmity [they are] supposed to prevent -- i.e., the taint of an arrest without probable cause -- . . ." Petition at 43a. Thus it would be absurdly self defeating to accord them any attenuating significance.

Johnson is also distinguishable because it deals with substantially less flagrant police misconduct -- indeed, arguably with no misconduct at all. The police there had probable cause to arrest for crime A and there is no suggestion that they thought that by arresting Johnson without a warrant they could secure identification testimony in case B. In this case, the record shows that the illegality -- an arrest for investigation without probable cause -- was perpetrated for the very purpose of obtaining the fruit -- identification evidence -- now in dispute.

The court below also rejected the contention which the government made there and repeats in its petition here that because the witness was clearly "willing" to testify at trial that alone serves to attenuate the fruit from the official police misconduct. Petitioner's argument attempts to draw a parallel between this case and Ceccolini, where this Court found the witness' willingness to testify an important (though not decisive) factor in determining the degree of attenuation. While we agree that the willingness of the witness to testify is a very significant factor where, as in Ceccolini, it is knowledge of the witness' existence or identity that is obtained as a result of the police illegality, that factor is simply beside the point in a case such as this, where it is the identification of the defendant by the witness that is the direct and intended fruit of the misconduct. This is because, as this Court pointed out in Ceccolini, where knowledge of the witnesses' existence or identity is uncovered as a result of a Fourth Amendment violation

it is reasonable to assume that,

[t]he greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means. And, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness. . . . Witnesses can, and often do, come forward and offer evidence entirely of their own volition.

435 U.S. at 276. But, conversely, where, as in the instant case, the illegal seizure of the respondent was made for the very purpose of securing the challenged identifications, the police will have every incentive to continue to effect illegal investigatory arrests of precisely the sort made here unless, as the court below recognized, those identifications themselves are suppressed. Thus, as the court of appeals concluded, "the free will of the witness in the present case does not represent an attenuating, intervening force." Petition at 52a, n.37. This is certainly not a departure from Ceccolini, but merely a manifestly correct application of its rationale to a different set of facts.

Finally, and of "particular" importance, the Court of Appeals found that the illegality here was flagrant, and that its very purpose was to obtain the fruit now in issue. As that court aptly summarized:

The remarkable parallels to the offending police activity in Brown v. Illinois, supra, are noteworthy. In that case, as this,

[t]he impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was 'for investigation' or for 'questioning.' . . . Petition at 48a.

The major difference is that while in Brown the objective of the misconduct was primarily to question the suspect -- hence statements were rightly suppressed -- here that objective was to secure the suspect's photograph for possible identification evidence that was correctly suppressed.

Because, then, the official misconduct here was so flagrant, and its purpose so inextricably bound with its fruits, we submit this was, as the court below found, a particularly appropriate case to reject the argument for attenuation and to apply the exclusionary rule to all the fruits of that misconduct.

The petitioner, perhaps sensing that its attenuation argument is unpersuasive, proceeds to take an even harder, but less defensible, line of attack, asking this Court to fashion a per se rule that a victim's identification testimony should never be treated as the fruit of police misconduct, not because such testimony is in fact never an unattenuated fruit of that misconduct, but because of "the manifest costs to society of disabling such witnesses." The assertion -- which is not really an argument at all -- is, of course, really no more, or less, than a broadside attack on the exclusionary rule because the "social costs" of suppressing them are too high. But even more important, the petitioner's position was effectively rejected by this Court just last term in Ceccolini, supra, and thus does not warrant further consideration by this Court.

In Ceccolini, the respondent-defendant argued that a witness' identity was learned as a result of police misconduct and thus that all of the witness' testimony should be excluded at trial. The government, on the other hand, contended that the live testimony of a witness at trial could never be the "fruit"

of police misconduct. The government's per se position was rejected:

An examination of these cases leads us to reject the Government's suggestion that we adopt what would in practice amount to a per se rule that the testimony of a live witness should not be excluded at trial no matter how close and proximate the connection between it and the Fourth Amendment. 435 U.S. at 274-275.

The Court then went on to determine whether, in the case before it, the trial testimony was in fact a fruit of the police misconduct.

Ceccolini, then, necessarily answers petitioner's contention here; for in the instant case the challenged fruit is not all the live testimony of a witness, as it allegedly was in Ceccolini, but only the witness' identification testimony. Under the Court of Appeals' ruling, it is only that portion of the witness' testimony that is excluded. By rejecting the government's argument for a per se rule in Ceccolini, this Court recognized that in some situations, at least, all of a witness' live testimony might be excludable as the fruit of an illegality. The Court of Appeals correctly concluded that on the facts before it, a portion of a live witnesses' testimony was just such a fruit.

The petitioner attempts to distinguish Ceccolini on the ground that here the "evidence" was known to the authorities prior to the illegality, while in Ceccolini the witness' identity did not become known until after the misconduct. If that analysis were correct, there would, of course, be no "fruit of the poisonous tree" issue here at all, for there would be an

independent, pre-existing source for it. The evidence in dispute is not, of course, the witness' identity, as it was in Ceccolini, but rather, the witness' identification testimony of the respondent as the assailant. That evidence did not materialize until after the police illegality, and was the direct and intended result of it. It is that evidence, not the testimony of the witness generally, that was excluded by the Court of Appeals. Indeed, the petitioner as much as acknowledges this point when it concedes that the witness' ability to identify her assailant acquired "prosecutive utility" only after the police illegally arrested the respondent and obtained his picture. It is that "prosecutive utility" that is the fruit which was properly excluded by the Court of Appeals.

In light of the clear implications of Ceccolini, there is no reason to tarry long over the petitioner's contention that in excluding live testimony the Court of Appeals' analysis was inconsistent with "this Court's disposition of several significantly analogous lines of cases"; for this Court was, of course, aware of those "lines of case" when it rejected a per se approach to such testimony in Ceccolini.

The first "line" that petitioner cites is that consisting solely of Frisbie v. Collins, 342 U.S. 519 (1952), and Ker v. Illinois, 119 U.S. 436 (1886). As the Court of Appeals carefully explained, those cases are inapposite. The petitioner-defendants in Frisbie and Ker were illegally arrested, and sought to block their criminal prosecutions altogether on that basis alone, arguing that it violated due process to prosecute a person after an illegal arrest. This Court rejected that contention in both cases. Respondent here, however, has never advanced such a claim, and the Court of Appeals' ruling is explicitly premised on the

continuing vitality of the Ker-Frisbie doctrine. We readily acknowledge that in this case, as frequently happens, a proper application of the exclusionary rule results in the Government having insufficient evidence to prosecute. That is a far cry, however, from the arguments propounded, and rejected, in Ker and Frisbie that an accused gains complete immunity from prosecution merely because his arrest was effected by police officers who did not have authority to arrest in the jurisdiction where they apprehended the defendant, and even though there was probable cause for the arrest, there were no direct or indirect fruit of the illegality, and the accused received a fair trial.

Surely petitioner grossly exaggerates the pertinence of Frisbie and Ker to this case when it contends that in both decisions the Court was "plainly of the view" that Fourth Amendment violations did not make inadmissible eyewitness testimony. In fact, Frisbie and Ker were decided before the exclusionary rule was made applicable to state prosecutions, see Mapp v. Ohio, 367 U.S. 643 (1961). Moreover, Ker specifically left open the question of whether a judicial sanction short of dismissal of the prosecution -- such as the sanction applied here -- would sometimes be appropriate where there had been an illegal arrest:

We do not intend to say that there may not be proceedings previous to trial, in regard to which the prisoner could invoke in some manner the provisions of this clause of the Constitution; . . . 119 U.S. at 440.

Finally, and decisively, Ceccolini clearly repudiates the broad reading of Ker-Frisbie which the government advances here.

Petitioner also cites Wade v. United States, 388 U.S. 218 (1967); Manson v. Brathwaite, 432 U.S. 98 (1977); and Neil v. Biggers, 409 U.S. 188 (1972), as supporting its argument for a per se rule with respect to live testimony. But as the court below explained, the "lynchpin" of those cases is the reliability of identification testimony, and the "independent source" test that has been expounded in connection with them is designed to insure reliable evidence that will promote the quality and fairness of criminal trials. In that vein this Court has eschewed broad exclusionary rules where that reliability could be assured through rules of more limited application. Manson, supra, 432 at 112. The touchstone of the Fourth Amendment exclusionary rule, on the other hand, is deterrence:

We have recently said, in a search and seizure context, that the exclusionary rule's 'prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.' United States v. Calandra, 414 U.S. 338, 347 (1974). We then continued:

"The rule is calculated to prevent, not to repair. Its purpose is to deter -- to compel respect for the constitutional guaranty in the only effective available way -- by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960). (footnote omitted).

Michigan v. Tucker, 417 U.S. 433, 446.

* * *

The primary justification for the exclusionary rule then is the deterrence of police conduct that violated Fourth Amendment rights. Stone v. Powell, 428 U.S. 465, 486 (1976).

Viewed from this deterrent perspective, it is clear that it is to precisely this sort of case -- one involving, as it did, purposeful police misconduct designed to obtain just the evidence sought to be suppressed -- that the exclusionary rule most logically should be applied. And, manifestly, the evidence suppressed must include all the identification testimony sought by the police misconduct, including the in-court identification. The government has yet to suggest a logical distinction between out-of-court and in-court identifications as potential fruits, and it is patently obvious that in this case to permit the government to profit from the intentional illegality by using an in-court identification would fatally undermine the deterrent rationale of the exclusionary rule.

It is true that the evidence suppressed was live testimony. But as this Court said in Ceccolini, such testimony, like any other evidence, may, depending on the facts, be a suppressible fruit of police misconduct. The court below simply applied the teachings of this Court diligently and intelligently to the unusual facts before it. Accordingly, the government's petition ^{4/} for certiorari should be denied.

Respectfully submitted,

Silas J. Wasserstrom
 Silas J. Wasserstrom
 Public Defender Service
 451 Indiana Avenue, N.W.
 Washington, D.C. 20001
 628-1200

W. Gary Philman
 W. Gary Philman
 Public Defender Service
 451 Indiana Avenue, N.W.
 Washington, D.C. 20001
 628-1200

^{4/} In a concluding footnote the petitioner suggests that because the Court of Appeals rejected its "inevitable discovery" argument this Court should grant review. Even petitioner concedes that at best that doctrine has the "apparent approval" of this Court. Petition at 20 n.11. The Court of Appeals assumed, arguendo, the doctrine's vitality and found that the government had not met its burden. Petition at 34a-35a. We submit that this finding is amply supported by the record, but at all events, any factual disagreement is surely not worthy of this Court's consideration.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition
to Government's Petition for Writ of Certiorari has been served
by first class mail, postage prepaid, on the Office of the
Solicitor General, Department of Justice, Washington, D.C.
20530, this 9th day of January, 1979.


W. GARY KOHLMAN

No. 78-777

Supreme Court, U. S.

FILED

JUN 13 1979

MICHAEL K. JR. CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

KEITH CREWS

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

RICHARD A. ALLEN
Assistant to the Solicitor General

FRANK J. MARINE
Attorney
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-777

UNITED STATES OF AMERICA, PETITIONER

v.

KEITH CREWS

*ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS*

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-60a) is reported at 389 A.2d 277. The earlier panel opinion (Pet. App. 63a-87a) is reported at 369 A.2d 1063.

JURISDICTION

The judgment of the court of appeals (Pet. App. 61a-62a) was entered on June 14, 1978. The time for

filing a petition for a writ of certiorari was extended to and including November 11, 1978. The petition for a writ of certiorari was filed on November 10, 1978, and was granted on February 21, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the reliable in-court identification testimony by the victim of a crime, who immediately reported the crime to the police, should have been suppressed as the fruit of a later unlawful detention of respondent that produced the initial identification of him as the offender.

STATEMENT

Respondent was indicted and tried before a jury for three robberies of different women in a restroom near the Washington Monument, in violation of D.C. Code §§ 22-2901 and 22-3202 (1973). The jury convicted him of the robbery of Carol Owens and acquitted him of the other two robberies. He was sentenced to four years' probation under the Youth Corrections Act. After a divided panel of the District of Columbia Court of Appeals affirmed (Pet. App. C; 369 A.2d 1063, 1064), the court considered the case en banc and reversed, two judges dissenting (Pet. App. A).

1. Before trial, respondent moved to suppress all evidence showing his identification by the three victims as the robber. The evidence adduced at the suppression hearing established that on the morning of January 3, 1974, while Carol Owens was in one of

the stalls of the restroom, a man reached over the top of the partition, pointed a gun at her, and demanded \$10, which she gave him (A. 9-10). When the assailant demanded more money, Owens told him she did not have any more. The assailant then forced entry into the stall and made sexual advances. Owens pleaded with him to leave, which he eventually did after warning her not to come out for 20 minutes, or he would return and shoot her (A. 10-11, 16-17).

The restrooms were well lit by fluorescent lighting, and Owens testified that she got a good look at her assailant for at least two and a half to three minutes (A. 10-11, 16-17). Owens described her assailant as dark complexioned, 16-18 years old, with smooth skin, and about 5'5" to 5'8" tall (A. 11). Twenty minutes after the robbery, she reported it to the police and gave them a description of the assailant (A. 11, 30-31).¹

Three days later, in the mid-afternoon of January 6, 1974, a young man assaulted and robbed two other women, Sandra Denner and Ann Lawson, in a similar fashion in the same restroom. They also reported the incident to the police and provided a description matching the description given by Owens of the January 3 robber (A. 31; Pet. App. 3a).

Around noon on January 9, 1974, two Park Police officers saw respondent near the concession stand at the Washington Monument. The officers approached

¹ On the day of the robbery, police showed Owens about 100 photographs of possible suspects, but she did not identify any as her assailant (A. 11-12).

him, asked him his name and age, and told him that he matched the description of a suspect sought in connection with robberies at the Monument. Respondent gave the officers his name and said his age was 16. When asked why he was not in school, respondent replied that "he walked away from school." Respondent then left and went into the men's restroom. While he was there, the officers spoke to a tour guide who had reported having seen a young man "standing around" in the Monument area on the day of the January 3rd robbery. When respondent came out of the men's room, the tour guide told the officers that he thought that respondent was the person he had seen on January 3.² The officers then approached respondent again and detained him. Detective Ore, who was investigating the robberies, was immediately summoned. He tried to take several Polaroid photographs of respondent at the scene, but it was raining and the photographs did not develop properly. Accordingly, the officers took respondent to Park Police headquarters, where they photographed him, telephoned his school, and released him within an hour³ (A. 32-33, 37, 40). Respondent was never formally arrested nor charged with an offense, and he never voiced objection to having his photograph taken (A. 38, 41-42).

² At trial the tour guide positively identified respondent as the person he saw near the scene of the January 3 robbery of Owens (A. 57).

³ The officers took the photographs both pursuant to routine police procedures relating to possible truants (A. 32-33, 39-40; see D.C. Code § 31-201 (1973)) and to show them to the robbery victims (A. 37).

On January 10, 1974, the officers showed a photographic array, including a photograph of respondent, to Owens. She selected respondent's photograph as that of the person who had robbed her (A. 12-13). On January 13, Lawson also selected respondent's photograph from an array (A. 25). Respondent was again taken into custody, and on January 16 a Superior Court judge ordered him to appear at a lineup (Pet. App. 5a). At the lineup, Owens and Lawson positively identified respondent as their assailant (A. 13, 25). Denner did not review any photographic array or attend the lineup (A. 29).

At the conclusion of the suppression hearing, the trial court ruled that the detention of respondent at Park Police headquarters constituted an arrest and was improper because it was not supported by probable cause.⁴ Although it did not find the photographic or lineup identification to have been suggestive, it ruled that both were fruits of the illegal arrest and that evidence of those identifications could not be

⁴ We believe that the facts known to the officers at the time of their initial encounter with respondent and his tentative identification by the tour guide were sufficient to establish a reasonable suspicion that he was involved in criminal activities and to justify a brief detention for inquiry and for the purpose of taking respondent's photograph. While we entirely disagree with the court of appeals' characterization of petitioner's detention at Park Police headquarters as a "flagrant" violation of his Fourth Amendment rights (Pet. App. 44a), we do not here challenge the ruling of the courts below that the nature and extent of the detention exceeded permissible bounds. See *Dunaway v. New York*, No. 78-5066 (June 5, 1979). See also discussion *infra*, pages 50-53.

introduced at trial (A. 44). Finding, however, that the victims' identification of respondent at trial would be based on observations made at the time of the crime and would be independent of the photographic and lineup identifications, the court declined to suppress the victims' in-court identifications of respondent (A. 44-45).

At the trial, Owens testified that there was absolutely no doubt in her mind that respondent was her assailant. She stated that the restroom was well lit and that at one point during the incident respondent sat on her lap and was only a few inches from her (A. 52; see generally A. 46-53). Lawson also positively identified respondent as the person who robbed her and Denner (A. 65-66). Denner was less sure of her identification, but selected respondent as the person in the courtroom most closely resembling her assailant (A. 60-61). Respondent denied committing the robberies on either January 3 or January 6 (Tr. 172-179) and presented a witness who testified that respondent went to a movie with him on January 6 (Tr. 153). The jury convicted respondent of the January 3 robbery and acquitted him of the robberies on January 6 (Tr. 239-240).

2. A panel of the District of Columbia Court of Appeals affirmed (Pet. App. 63a-87a). The panel held that Owens' in-court identification testimony was not a fruit of the January 6 arrest of respondent within the meaning of the "fruit of the poisonous tree" doctrine, but rather was a product of Owens' independent recollection of the crime (*id.* at 69a-

73a). Alternatively, the panel held that even if Owens' testimony could be regarded as causally related to respondent's arrest, the policies of the exclusionary rule did not require suppression. The court noted that "[i]n the final analysis, what [respondent] seeks is no less than an immunity from any prosecution"—a result that would impose a social cost outweighing "whatever incremental deterrence arguably might be provided by barring the victims' in-court testimony, in addition to the photographic and lineup identifications which were excluded by the trial court * * *" (*id.* at 80a-81a).

The court of appeals en banc reversed, two judges dissenting (Pet. App. 1a-60a). The court held that the victim's in-court identification should have been suppressed as the fruit of the January 9 detention, notwithstanding that the identification was reliable and based on the witness's independent recollection of the crime. The court reasoned that the testimony was the fruit of the detention because the photograph then taken led to the identification of respondent as the assailant, which led to his rearrest, which led ultimately to his trial in which the testimony was given (*id.* at 20a-21a). Thus the court stated (*ibid.*):

The causal chain posited by appellant runs as follows: the unlawful arrest produced photographs which were shown to the complaining witnesses who, as a result, identified appellant; this resulted in his reappréhension, which yielded a court-ordered lineup identification and,

eventually, in-court identification testimony during prosecution of the case. Thus, appellant says, the courtroom identification testimony was "actually discovered by" (i.e., made available to the government through) "a process initiated by the unlawful act." *United States v. Paroutian*, 299 F.2d 486, 489 (2d Cir. 1962).

* * * * *

Appellant Crews clearly demonstrated a causal connection between the unlawful arrest and the in-court identification in this case.

The court rejected the government's argument that respondent's identity would inevitably have been discovered through routine investigation, declining to adopt the inevitable discovery doctrine in its jurisdiction (*id.* at 28a-29a). Finally, the court rejected the contention that the victim's testimony was sufficiently attenuated from the illegality attendant upon the brief detention on January 9. The court distinguished this Court's decision in *United States v. Ceccolini*, 435 U.S. 268 (1978), on the grounds that the time between the arrest and the testimony (three and a half months) was "quite a brief period" and in any event largely irrelevant (Pet. App. 38a-39a), that there were no "significant" intervening events (*id.* at 39a-43a), that the police misconduct here was "flagrant" and "purposeful" (*id.* at 44a), and that Owens' free will in testifying did not "represent an attenuating, intervening force" (*id.* at 52a n.37).⁵

⁵ The court also rejected the argument that suppression of Owens' testimony would be contrary to the principles of *Frisbie v. Collins*, 342 U.S. 519 (1952), and *Ker v. Illinois*,

Judges Nebeker and Harris dissented (Pet. App. 55a-60a). In their view, Owens' in-court identification testimony could not reasonably be viewed as a fruit of respondent's detention on January 9, and the majority's decision had the consequence of "permanently silenc[ing] the victim of a crime whose ability to testify was unrelated in any way to the unconstitutional seizure of [respondent]" (*id.* at 60a), a result they deemed incompatible with *Ceccolini*.

SUMMARY OF ARGUMENT

This case concerns the admissibility of reliable and independent in-court testimony of a robbery victim identifying her assailant. The court of appeals held the victim's testimony to be an inadmissible "fruit" of an illegal detention of respondent because, during the course of the detention, police obtained a photograph of respondent that was used to identify him as the culprit. We advance three grounds for the conclusion that the court of appeals erred: (1) because the police knew the identity of the witness and were aware that she could identify her assailant prior to and independently of the illegal detention of respondent, the in-court testimony cannot properly be

119 U.S. 436 (1886), which held that an unlawful arrest does not impair the court's jurisdiction to try the defendant. Although the court expressed doubts about the continuing validity of *Frisbie* and *Ker* (Pet. App. 8a; but see *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975)), it held that those decisions were in any event inapposite because in the instant case the court was only suppressing evidence and was not dismissing the indictment (Pet. App. 15a & n.7).

viewed as a suppressible "fruit" of the subsequent Fourth Amendment violation; (2) even if the in-court testimony could be viewed as a "fruit," the principles of attenuation indicate that it is admissible; and (3) even if it could otherwise be viewed as a non-attenuated fruit of the illegal detention, the testimony of the victim of a crime, particularly a crime of violence, should not be subject to suppression.

I

The first and most important question posed by this case is whether evidence lawfully acquired by investigating officers prior to or independently of a Fourth Amendment violation should be deemed a "fruit" of the violation, when the violation simply enables the police to link the lawfully acquired evidence to a particular suspect. Although the evidence in this case happens to be witness testimony, the "fruits" analysis employed by the court of appeals, if valid, could also lead to the suppression of physical evidence, such as fingerprints or items of clothing left at the scene of the crime.

A. This Court has never had occasion to confront directly a "fruits" question of the kind presented in this case. The Court's previous decisions respecting the "fruits" of illegal conduct all involved the more conventional situation in which the challenged evidence has been acquired by the police as a result of a chain of events proceeding from an initial unlawful act. In such cases the court has inquired whether the challenged evidence was itself illegally obtained

by the police, and the doctrine of attenuation has been the means by which the Court has sought to determine whether the nexus between the illegality and the evidence is sufficiently great to justify suppression.

We submit that evidence lawfully acquired should simply not be subject to the Fourth Amendment exclusionary rule. The evidence in this case—Owens' ability to identify respondent as her assailant—became available to the police when she reported the robbery; it was not the product of a Fourth Amendment violation. The court of appeals, however, suppressed that lawfully acquired evidence because the detention of respondent was an important step in the chain of events that enabled the witness to identify respondent at the trial.

We acknowledge that there is a sense in which it may be said that Owens' testimony was a "fruit" of respondent's detention. As a matter of common sense, however, it seems strained to say that the victim's ability to identify her assailant was illegally acquired by the police despite the fact that they already "possessed" this evidence when respondent was detained.

B. To the extent this Court's prior decisions shed light on this question, they support our position. In *Frisbie v. Collins*, 342 U.S. 519 (1952), the Court held that a prosecution could properly proceed despite the fact that the defendant's presence in court was the result of an illegal seizure of his person. While it is true that *Frisbie* concerned the trial court's jurisdiction and not the admissibility of evidence, we

think it unlikely that the Court that allowed the trial to go forward would have countenanced exclusion of all the prosecution's evidence on the ground that the illegal seizure of the defendant was indispensable to the successful use of that evidence. In both *Frisbie* and the instant case, the fact that evidence otherwise lawfully acquired gained prosecutive utility by virtue of an illegal arrest does not require its exclusion.

In *Davis v. Mississippi*, 394 U.S. 721 (1969), the prosecution introduced fingerprints that were obtained during an unlawful arrest of the petitioner, matching them to those found at the scene of a rape. The Court held that this set of fingerprints (analogous to Owens' pretrial photo identification of respondent) should have been suppressed. On the court of appeals' theory in this case, however, all the evidence identifying Davis as the rapist, including the victim's testimony, would similarly have been subject to suppression. Far from suggesting any such result, the Court's opinion indicates the contrary. See 394 U.S. at 725 n.4; see also *id.* at 730 (Stewart, J., dissenting).

C. Our position is further bolstered by considerations of exclusionary rule policy. The incremental deterrence benefits that might derive from adoption of the court of appeals' analysis are outweighed by its potential costs to society and to the administration of justice.

We do not deny that, to the extent suppression of evidence influences police behavior, the risk of the "retroactive taint" of evidence already possessed will

provide some increment of deterrence against unlawful detentions to aid in suspect identification. We suggest, however, that this increment will not be substantial in light of the impact of conventional applications of the exclusionary rule. Thus, in the absence of attenuating circumstances, an illegal detention will result in suppression of statements made by the suspect, evidence found on his person, and pretrial identifications produced during or by the detention. In-court identification testimony could also be excluded if it is found not to have a basis independent of the pretrial identification. Moreover, in-court identifications, made months after the crime, usually have far less persuasive force than prompt pretrial identifications. In light of these costs, the marginal deterrence benefits of retroactive taint are unlikely to be substantial.

The costs of the court of appeals' theory of "retroactive taint" are substantial, however, particularly in contrast to its limited and speculative benefits. In the instant case, the theory results in silencing the victim of a crime. But the theory cannot effectively be limited to a narrow category of cases. Rather, whenever an unlawful arrest or detention has led to identification of the defendant as the perpetrator of a crime, the taint would bar the use of all lawfully acquired evidence that gained utility to the prosecution because it was linked to the defendant as a result of the detention. The consequence would be to immunize illegally arrested defendants from effective prosecution in a large class of cases, even though the prosecution

would not be offering any evidence that was itself unlawfully obtained.

Furthermore, because the Fourth Amendment violation would lack the normal causal relationship to the challenged evidence, it would prove difficult to utilize attenuation analysis to limit the impact of the "retroactive taint" principle. It is hard to give meaningful application to considerations of temporal proximity, intervening cause, and witness free will when the acquisition of the challenged evidence is lawful and precedes the Fourth Amendment violation. The attempt to apply attenuation analysis on a case-by-case basis would, we believe, require an expenditure of judicial energies far in excess of any sensible and meaningful results that could be obtained.

II

Even if this Court accepts the principle of retroactive taint and approaches this case by application of attenuation analysis, Owens' testimony should not be subject to suppression. While the factors of temporal proximity and intervening cause usually can have little meaningful application when the evidence was acquired prior to the violation, we note the presence in this case of one significant intervening event that was indispensable to the admission of Owens' testimony and not predictable at the time respondent was improperly detained: the ruling by the trial court that Owens' in-court testimony was reliable and independent of the suppressed pretrial identifications. As for the factor of witness free will, it is difficult

to imagine a case in which that factor is more clearly present. Moreover, we submit that the relatively brief detention of respondent for the limited purpose of taking his photograph was not a flagrant violation of his Fourth Amendment rights. Finally, we note that the court of appeals appeared to give no weight to this Court's injunction in *United States v. Ceccolini*, 435 U.S. 268, 277-280 (1978), that exclusion of live witness testimony should be ordered reluctantly and should be limited to cases involving the most direct nexus between the violation and the acquisition of the testimony. See also 18 U.S.C. 3502.

III

Finally, even if Owens' testimony could properly be regarded as an unattenuated fruit of respondent's detention, the suppression of the willing, volunteered, and reliable identification testimony of the victim of a crime is, as the court of appeals stated in *Payne v. United States*, 294 F.2d 723 (D.C. Cir. 1961), "not the right way to control the conduct of the police, or to advance the administration of justice." Whatever considerations may be appropriate for other kinds of evidence, depriving an individual of an opportunity to appear at the bar of justice and testify against the person who injured him threatens to produce a resentment and disrespect for the law considerably greater than that which may be engendered by exclusion of other kinds of evidence.

I. THE IDENTIFICATION TESTIMONY OF THE ROBBERY VICTIM WAS NOT A "FRUIT" OF THE UNLAWFUL DETENTION OF RESPONDENT

The court of appeals held that the testimony of the victim, Carol Owens, identifying respondent as the person who robbed her on January 3, 1974, should have been suppressed because (1) that testimony was the evidentiary "fruit," for exclusionary rule purposes, of respondent's illegal detention on January 9, and (2) the use of that testimony was not sufficiently attenuated from the initial illegality to dissipate the taint. Both conclusions are necessary to the court's holding, and we argue in Point II, *infra*, that even assuming the correctness of the first, the court was wrong in concluding that the taint, if any, was not attenuated. We argue in this Point that the court's principal error is in its first conclusion, *i.e.*, that Owens' testimony was the fruit of respondent's detention for exclusionary rule purposes.

In the conventional setting in which this Court and the lower federal courts have explicated the "fruit of the poisonous tree" doctrine, there has been an illegal search or arrest by law enforcement officers initiating a chain of events leading to the acquisition of the challenged piece of evidence. In such cases, the courts are called upon to decide whether there is a sufficiently direct nexus between the illegality and the acquisition of the evidence to justify application of the exclusionary rule. Because of the multitude of factual configurations in which this type of question arises, it has proved exceptionally difficult to evolve "bright-line" tests by which the correct result may be

ascertained. The principal governing standard is attenuation, *i.e.*, the extent to which the acquisition of the challenged evidence is proximate to or remote from the illegal act and the extent to which its acquisition is the product of significant intervening and untainted causes. See *Wong Sun v. United States*, 371 U.S. 471 (1963). Consideration may also be given in certain classes of cases to the nature of the evidence that is sought to be suppressed (see *United States v. Ceccolini*, 435 U.S. 268 (1978)) and to the purposefulness or flagrancy of the violation (see *Brown v. Illinois*, 422 U.S. 591, 604 (1975)).

The present case, however, involves an entirely different kind of relationship between the challenged evidence—the identification testimony of Owens, the robbery victim—and the Fourth Amendment violation. Owens' knowledge of the appearance of her assailant and other circumstances of the crime was known to the police before any illegal act on their part, and thus, unlike the typical "fruits" case, the improper detention did not initiate a chain of events leading to the acquisition of the challenged evidence. Rather, the detention served the function of giving prosecutive utility to evidence already possessed by the police. The basic question, accordingly, is whether evidence already possessed by the police prior to any illegal act on their part (or developed by them wholly independent of any such act) should be viewed as a potentially suppressible "fruit" solely on the ground that the illegal act served to link the lawfully obtained evidence to the individual and give it prosecutive utility at trial.

It is our basic submission in this case that evidence lawfully acquired should never be subject to exclusion when the sole "taint" concerns the manner in which it was linked to the particular defendant. Under the view of the court of appeals, on the other hand, any evidence linking the defendant to the offense is a potentially suppressible "fruit" of an illegal arrest or detention precisely because that action enabled the investigating officers to realize that the defendant is indeed the culprit.

Which of these positions is sounder is a matter that cannot be resolved by sheer force of logic or by semantic analysis of the metaphor "fruit of the poisonous tree." While the challenged evidence in this case was itself in no way the product of respondent's detention—the police already knew of Owens, and her capacity to identify respondent existed independent of the detention and the photograph procured during that detention—it was nevertheless the unlawful detention that led to the use of the evidence against respondent at his trial. Moreover, because there is no causal chain leading from the illegality of the discovery of the evidence, attenuation analysis is exceedingly difficult to apply.

However intractable the problem may appear as a matter of abstract logic, we submit that prior decisions of this Court in closely analogous contexts point to the conclusion that lawfully obtained evidence is not to be deemed a suppressible product of an unlawful arrest or detention that gives that evidence prose-

cutive utility. This conclusion is, moreover, substantially reinforced by considerations of exclusionary rule policy.⁶

A. The Fruits Theory of the Court of Appeals Has Never Been Endorsed by This Court and Is Inconsistent With the Principles Established in Analogous Cases.

Almost all of the decisions of this Court in which evidence has been challenged as the tainted fruit of official misconduct have involved physical evidence, information, or testimony about such information that had been acquired by the police after and as a result of their misconduct. See, *e.g.*, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (documents discovered in the course of an illegal

⁶ Our point here relates to cases in which the only nexus between the challenged evidence and the unlawful conduct is the linking of lawfully acquired information to the particular defendant—a nexus that, as noted, is entirely different from the conventional nexus between evidence and unlawful conduct that the courts have considered in applying the exclusionary rule. In our view, therefore, there is a significant difference between evidence like Owens' in-court identification testimony and such evidence as her post-arrest identification of respondent's photograph. The relationship between the unlawful detention and the latter kind of evidence is an example of the conventional relationship to which the "fruit of the poisonous tree" concept has been applied: but for the unlawful detention, the police would not have obtained the photo identification. To such evidence, established principles of attenuation can be meaningfully applied. See *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972).

search); *Nardone v. United States*, 308 U.S. 338 (1939) (evidence obtained after and allegedly as a result of an illegal wiretap); *Wong Sun v. United States*, *supra*, and *Brown v. Illinois*, *supra* (incriminating statements by the defendants made after their unlawful arrest); *Davis v. Mississippi*, 394 U.S. 721 (1969) (fingerprints taken from the defendant during his unlawful detention); *United States v. Ceccolini*, 435 U.S. 268 (1978) (testimony of a witness whose knowledge of criminal activity was learned by the police after and, in a strictly causal sense, as a result of an unlawful search).

Those and other decisions at least implicitly indicate that the evidentiary products to which the exclusionary rule applies have been generally understood to consist of information that the police have acquired after and as a result of their unlawful conduct. Indeed, in the few cases in which the claim has been made, the Court has expressly rejected challenges to the use of lawfully acquired evidence where the challenge is based on some subsequent misconduct. We submit that the decision of the court of appeals in this case cannot be reconciled with the principles established by those cases.

In *Frisbie v. Collins*, 342 U.S. 519 (1952), the defendant Collins had been tried and convicted of murder by a state court in Michigan. He later contended in a petition for habeas corpus that the conviction was invalid because he had been brought to trial in Michigan only as a result of having been

kidnapped by Michigan officers in Illinois, in violation of the Fourth Amendment and the Federal Kidnapping Act. This Court rejected the claim and unanimously reaffirmed the principle established in *Ker v. Illinois*, 119 U.S. 436 (1886), that

the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." * * * [The *Ker* line of cases] rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.

342 U.S. at 522 (footnote omitted). This Court recently reaffirmed that principle in *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975), and *Stone v. Powell*, 428 U.S. 465, 485 (1976).

The principle of *Frisbie* and *Ker* is inconsistent with the court of appeals' holding that Owens' testimony was a fruit of respondent's detention for exclusionary rule purposes. Although the court of appeals concluded that *Frisbie* and *Ker* were inapposite because those cases concerned only the jurisdiction of a court to try a defendant and not the suppression of specific evidence (Pet. App. 6a-15a),

that distinction overlooks the principle of those cases and the rationale employed by the court of appeals itself in concluding that Owens' testimony was a tainted fruit. If, as the court of appeals held, evidence lawfully acquired by the police should be suppressed when a later unlawful arrest of the defendant is what makes that evidence useful and leads to its presentation at trial, then all of the evidence introduced against Ker or Collins, or any other defendant brought to trial by means violating their Fourth Amendment rights, should have been suppressed on the same principle. In those cases, as here, the value of that evidence, including any testimony by victims or eyewitnesses, was realized only by virtue of such Fourth Amendment violations. (See also pages 37-38, *infra*.) Yet it would be implausible to suppose that this Court in *Frisbie* and *Ker* was of the view that such evidence could not be used at trial, and that it held only that courts have jurisdiction over prosecutions that would in fact be impossible because the prosecution's evidence would all be inadmissible. Rather, *Frisbie* and *Ker* stand for the general principle that the Constitution does not require the extreme result of prohibiting a prosecution—including the necessary presentation of evidence in court and the matching of that evidence to the defendant in the courtroom—merely because in some sense an unlawful arrest was the *sine qua non* of the prosecution.⁷

⁷ It has been suggested that, because *Ker* and *Frisbie* were decided before *Mapp v. Ohio*, 367 U.S. 643 (1961), applied the exclusionary rule to the states, those cases would be

Although the Fourth Amendment violation here was far less egregious, the circumstances are analogous in some respects to *Davis v. Mississippi*, *supra*. In *Davis* a woman was raped and fingerprints of the apparent assailant were found at the scene. Without probable cause, the police rounded up a large number of Negro youths, including Davis, and obtained from Davis a set of fingerprints that matched those found at the scene of the crime. This Court concluded that evidentiary use of the fingerprints taken during the unlawful arrest (analogous to Owens' photo identification of respondent in this case) was prohibited as a tainted fruit of that arrest. There is no suggestion in *Davis*, however, that anything should have been suppressed other than the set of fingerprints taken during the arrest, and in dissent Mr. Justice Stewart made the point, not controverted by the majority, that other legally obtained fingerprints of the defendant

decided differently today. See Pitler, *The Fruit of The Poisonous Tree, Revisited and Shepardized*, 56 Calif. L. Rev. 579, 599-601 (1968). See also *United States v. Edmons*, 432 F.2d 577, 583 (2d Cir. 1970), in which the court suppressed the identification testimony of victims in part on the ground that "whether the [Supreme] Court would now adhere to [*Frisbie-Ker*] must be regarded as questionable." As the court of appeals acknowledged here, that contention has been rejected by the great majority of the courts of appeals (see Pet. App. 8a-9a, collecting cases) and is plainly untenable in view of this Court's recent statements indicating its continuing adherence to the *Ker-Frisbie* doctrine. See *Gerstein v. Pugh*, *supra*, 420 U.S. at 119; *Stone v. Powell*, 428 U.S. 465, 485 (1976).

could be used at a retrial and matched with those found at the scene (394 U.S. at 730).⁸

It is significant that the majority in *Davis* did not disagree with the proposition stated by Mr. Justice Stewart, but concluded that it was irrelevant to the exclusionary rule. In the majority's view, whether or not the prosecution could easily obtain the same information by lawful means and match it at trial with other evidence lawfully obtained (*i.e.*, the fingerprints found at the scene) was immaterial because the exclusionary rule nevertheless requires the suppression of evidence actually obtained by unlawful means. 394 U.S. at 725 n.4.⁹ The Court thus im-

⁸ Thus, Mr. Justice Stewart stated (394 U.S. at 730; footnote omitted):

Fingerprints are not "evidence" in the conventional sense that weapons or stolen goods might be. Like the color of a man's eyes, his height, or his very physiognomy, the tips of his fingers are an inherent and unchanging characteristic of the man. And physical impressions of his fingertips can be exactly and endlessly reproduced.

We do not deal here with a confession wrongfully obtained or with property wrongfully seized—so tainted as to be forever inadmissible as evidence against a defendant. We deal, instead, with "evidence" that can be identically reproduced and lawfully used at any subsequent trial.

⁹ Thus, the Court noted with approval the statement of the court of appeals in a similar case, *Bynum v. United States*, 262 F.2d 465, 468-469 (D.C. Cir. 1958): "It is entirely irrelevant that it may be relatively easy for the government to prove guilt without using the product of illegal detention. The important thing is that those administering the criminal law understand that they must do it that way." The Court also noted that "[o]n Bynum's retrial another set of fingerprints in no way connected with his unlawful arrest was used, and he was again convicted." 394 U.S. at 726 n.4.

plicitly recognized the distinction that we are urging between evidence acquired after and as a result of an illegal act—which is a fruit subject to suppression—and evidence lawfully obtained that merely becomes linked to the defendant through a later unlawful act—which is not. If the court of appeals is correct in this case, however, it would appear to follow not only that no other fingerprints could have been used against Davis, but that the testimony of the rape victim herself would have been subject to exclusion because of the role the illegally procured fingerprints played in identifying Davis as the culprit. (See also pages 37-38, *infra*.)

Finally, we believe that *United States v. Wade*, 388 U.S. 218 (1967), and related cases,¹⁰ although involving somewhat different considerations, are instructive in this context and reflect a view at odds with the broad theory of tainted fruits adopted by the court of appeals. Those cases have established that evidence of a pretrial identification must be suppressed if the procedures employed in securing the identification were unduly suggestive, or if, subsequent to the attachment of a right to counsel, the defendant was deprived of assistance of counsel during a lineup. Nevertheless, the Court has permitted the victim or witness to make an in-court identification if that testimony is, as here, based upon an independent recollection untainted by the improper

¹⁰ See, *e.g.*, *Gilbert v. California*, 388 U.S. 263 (1967); *Manson v. Brathwaite*, 432 U.S. 98 (1977).

pretrial identification procedures. See *id.* at 239-241.¹¹

We recognize, as the court of appeals noted in distinguishing the *Wade* line of cases (Pet. App. 21a), that this Court was concerned primarily with the unreliability of suggestive or uncounselled identifications, and not with Fourth Amendment violations or their fruits. It is nevertheless worth noting certain parallels between those cases and this case. In all pretrial identification cases (including those involving uncounselled or unduly suggestive identification procedures), the ability of the witnesses to identify the suspect will influence, to a greater or lesser degree, the belief of the police in the suspect's guilt; indeed, it will often be a significant factor in the decision whether or not to prosecute. To the extent there can be said to be some causal nexus between a pretrial identification and the decision to prosecute, the wit-

¹¹ Indeed Congress has passed a statute mandating this result for trials in federal courts. 18 U.S.C. 3502 provides in pertinent part: "The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence * * *." To the extent that such testimony refers to independent in-court identifications, the statute simply states the *Wade* rule and reflects the legislature's judgment that the suppression of such testimony would impose an unwarranted and unduly severe cost on society. To the extent the statute may be read to refer to identification testimony that is itself tainted by an impermissible pretrial identification, evidence of which is inadmissible under *Wade*, its validity has been questioned. See McGowan, *Constitutional Interpretation and Criminal Identification*, 12 Wm. & Mary L. Rev. 235, 249 (1970); *United States v. Edmons*, *supra*, 432 F.2d at 586.

ness's in-court testimony would, under the court of appeals' view, be a fruit of the identification; and if the pretrial identification was improper, the witness's in-court testimony should, under that view, be suppressed as a tainted fruit. Yet this Court has never suggested that independent and reliable in-court identification testimony should be suppressed as the fruit of a pretrial identification that violated the defendant's Fifth or Sixth Amendment rights, even though the prosecutive utility of the testimony may have been in a real sense enhanced by the prior illegality, and even though suppression might provide further deterrence against engaging in such procedures.¹²

¹² While this Court has not addressed the precise question, the great preponderance of the decisions of the courts of appeals on the matter have rejected the view of the court below that the independent identification testimony of witnesses or victims known to the police at the outset may be suppressed as the fruit of a pretrial identification resulting from an unlawful arrest. See *United States v. Young*, 512 F.2d 321, 323 (4th Cir. 1975), cert. denied, 424 U.S. 956 (1976); *Carson v. United States*, 332 F.2d 784 (5th Cir. 1964); *United States v. Hoffman*, 385 F.2d 501, 504-505 (7th Cir. 1967), cert. denied, 390 U.S. 1031 (1968); *Golliher v. United States*, 362 F.2d 594, 602 (8th Cir. 1966); *Jacobson v. United States*, 356 F.2d 685, 688 (8th Cir. 1966); *Edwards v. United States*, 330 F.2d 849, 851 (D.C. Cir. 1964); *Payne v. United States*, 294 F.2d 723 (D.C. Cir. 1961); see also *Baker v. State*, 39 Md. App. 133, 383 A.2d 698 (1978); *Commonwealth v. Garvin*, 448 Pa. 258, 264-266, 293 A.2d 33, 37 (1972). We are aware of only three published opinions that have employed a theory similar to that of the court below to suppress the testimony of such witnesses or victims. *United States v. Barragan-Martinez*, 504 F.2d 1155 (9th Cir. 1974); *United States v. Edmons*, 432

While we have argued that none of this Court's decisions supports the decision below and that several of them are inconsistent with it in principle, we nevertheless recognize that the Court has not addressed the precise issue presented in this case and that no court has articulated a definition of fruits or general method of analysis that would be readily applicable to that issue. We therefore turn to a consideration of the general purposes and policies of the exclusionary rule, which we believe support recognition of the limiting principle we have suggested and

F.2d 577 (2d Cir. 1970); cf. *United States v. Humphries*, No. 78-1622 (9th Cir. Jan. 19, 1979), petition for cert. filed, No. 78-1803. In *Edmons*, *supra*, the decision was based in part on the court's doubts about the continuing vitality of the *Ker-Frisbie* doctrine and also on the ground that the arrests were not made in "good faith" (432 F.2d at 583-584). A later Second Circuit opinion, however, permitted the in-court identification testimony of witnesses on the ground that the unlawful arrest leading to the pretrial identifications was made in "good faith." *United States ex rel. Pella v. Reid*, 527 F.2d 380, 383 (2d Cir. 1975).

Similarly, the courts of appeals have declined to apply a theory of retroactive taint to other evidence in the government's possession prior to an unlawful act that helps identify the individual as the culprit. For example, it has been consistently held that preexisting records in possession of the Immigration and Naturalization Service are not the fruit of a subsequent unlawful search or arrest that identifies a person as an illegal alien, and are admissible in his deportation proceeding. *Hoonilapa v. INS*, 575 F.2d 735, 738 (9th Cir. 1978); *Ho Chong Tsao v. INS*, 538 F.2d 667, 669 (9th Cir. 1976), cert. denied, 430 U.S. 906 (1977); *United States v. Martinez*, 512 F.2d 830, 832 (5th Cir. 1975); *Huerta-Cabrera v. INS*, 466 F.2d 759, 761-762 (7th Cir. 1972); cf. *Wong Chung Che v. INS*, 565 F.2d 166, 168 (1st Cir. 1977).

rejection of the court of appeals' expansive view of fruits.

B. The General Purposes and Policies of the Exclusionary Rule Do Not Support the Court of Appeals' Theory of Fruits.

The principal, if not the exclusive purpose of the exclusionary rule is to deter constitutional violations by law enforcement officers by removing the incentive to commit those violations. See, *e.g.*, *Stone v. Powell*, 428 U.S. 465, 486 (1976); *United States v. Janis*, 428 U.S. 433, 446 (1976). The fruit-of-the-poisonous-tree doctrine is a logical corollary of the rule in view of that purpose, since it is assumed that suppression only of evidence directly obtained by a violation, but no other fruits, would fail to provide an adequate deterrent.

At the same time, the Court had recognized in many cases that application of the exclusionary rule imposes significant costs on society. These costs include, of course, the failure of a certain number of prosecutions of guilty defendants because of suppression of evidence; but, perhaps more significantly, as the Court observed in *Stone v. Powell*, *supra*, 428 U.S. at 491, any widespread perception of undeserved windfalls to culpable defendants threatens to bring the law itself into disrespect and to undermine public confidence in the administration of justice. Accordingly, the Court has consistently applied the exclusionary rule on the basis of the general precept that, "[a]s with any remedial device, the application of the rule has been restricted to those areas where its

remedial objectives are thought most efficaciously served." *United States v. Calandra*, 414 U.S. 338, 348 (1974).

In accordance with that precept, this Court has recognized doctrines that limit the application of the rule, such as the requirement of "standing" and the theory of attenuation of taint. Such doctrines are largely based on the conclusion that in certain circumstances the incremental deterrent benefits that would result from suppression, although perhaps not negligible, do not outweigh the substantial social costs of suppression. See, e.g., *United States v. Ceccolini*, *supra*, 435 U.S. at 275-276; *United States v. Janis*, *supra*, 428 U.S. at 453-454; *Michigan v. Tucker*, 417 U.S. 433, 448 (1974); *United States v. Calandra*, *supra*, 414 U.S. at 349, 351; *Alderman v. United States*, 394 U.S. 165, 174-175 (1969). The same considerations of deterrence and social cost, as well as considerations of effective judicial administration, support the conclusion that suppression should be restricted to evidence uncovered by or as a product of the Fourth Amendment violation.

1. *The Court of Appeals' Theory Offers Limited Additional Deterrence Benefits.*

Under our analysis, the remedy of suppression would not be available unless the evidence in question came to light as the result of an illegal search or seizure or a chain of events proceeding causally from such a violation. As we discuss more fully below, the court of appeals' far more sweeping "fruits" concept would often bar virtually all of the prosecution's evi-

dence, however acquired, when the defendant's identity has been learned by virtue of an illegal arrest or detention. We cannot deny that the considerably more drastic impact of the court of appeals' analysis would, at least in theory, give the police some incremental incentive scrupulously to observe Fourth Amendment requirements in arresting or stopping persons suspected of possible involvement in criminal activity.¹³ Nevertheless, we submit that the marginal deterrence that can reasonably be anticipated to flow from the broad exclusionary principle of the court of appeals is insufficient to justify its potential costs.¹⁴

Thus, accepting our more restrictive definition of the "fruits" concept, there remain significant disincentives to unlawful arrests of suspects in the hopes of matching them to witnesses or other evidence al-

¹³ As this Court has noted on several occasions, whether or how the exclusionary rule and its various ramifications has actually affected police behavior has not yet been empirically demonstrated. See, e.g., *United States v. Janis*, *supra*, 428 U.S. at 449-453. The assumption of its deterrent value must be taken somewhat on faith.

¹⁴ Although the *Wade-Gilbert* prohibition against conducting lineups in the absence of defense counsel is motivated in substantial part by concerns about the reliability of such identification procedures, the exclusionary rule fashioned in those cases was also designed to deter improper police conduct. See *Manson v. Brathwaite*, *supra*, 432 U.S. at 112; *Stovall v. Denno*, 388 U.S. 293, 297 (1967); *Gilbert v. California*, *supra*, 388 U.S. at 273. While the deterrent effect of the rule would undoubtedly have been enhanced by exclusion of independently-based in-court identification testimony of witnesses who have made identifications during such lineups, the Court has nevertheless ruled that such testimony is admissible.

ready known. First, as happened in this case, if the arrest is unlawful, pretrial identifications produced by the arrest are subject to suppression. This Court has noted that the probative value to a jury of pretrial identifications, made while the witness's memory is still fresh, is usually greater than an in-court identification made in a trial held months or years after the crime.¹⁵ See *Gilbert v. California*, *supra*, 388 U.S. at 273-274 and n.3. See also *United States v. Higgins*, 507 F.2d 808, 811 (7th Cir. 1974); *Clemons v. United States*, 408 F.2d 1230, 1243 (D.C. Cir. 1968).¹⁶ Second, any statement by the arrested individual, or evidence on his person or fruits thereof, would be subject to suppression. See, *e.g.*, *Brown v. Illinois*, *supra*. Finally, any unconstitutional arrest or detention subjects the officers to possible civil liability under, *inter alia*, *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). See, *e.g.*, *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978).

¹⁵ The suppression of evidence regarding the pretrial identifications of respondent by the two other robbery victims may well have played a significant role in respondent's acquittal on those charges.

¹⁶ Indeed, one jurist has expressed the view that "juries tend to be massively unimpressed by identification evidence which consists solely of identification of the defendant by the witness from the witness stand. * * * Trial judges of my acquaintance report that juries not infrequently acquit when they are given nothing but an in-court identification; and in some instances individual jurors have complained to the judge that, in not being told about pretrial identification, they were being treated like children." McGowan, *supra*, 12 Wm. & Mary L. Rev. at 241.

Thus, even if evidence already known to the police is not subject to retroactive taint as the result of an illegal arrest, substantial disincentives to such misconduct remain. Furthermore, it assumes an improbable degree of sophistication to suppose that police officers would act unlawfully on the basis of calculations regarding the inapplicability of the court of appeals' doctrine of retroactive taint. This case does not disprove the point; indeed, it illustrates it. The record shows that the officers took respondent to the police station at least in part for the purpose of obtaining a photograph they could show to the robbery victims (A. 33, 37). But it does not show they did so in purposeful, or even reckless, contravention of what they believed to be their lawful authority. To the contrary, the record indicates that they believed their actions to be lawful, and that belief, though perhaps not correct and not a defense to any Fourth Amendment violation,¹⁷ was certainly not unreasonable. See note 28, *infra*. Thus, in this particular case the court of appeals theory of retroactive taint, even if understood by the officers to have been the law, would not have affected their conduct.¹⁸

¹⁷ See *Scott v. United States*, 436 U.S. 128, 135-137 (1978); *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968).

¹⁸ For that reason, as we argue below, the particular facts of this case militate against suppression under established attenuation principles, which recognize good faith and the non-flagrancy of the violation to be important factors in determining whether any taint was attenuated. The point we are making here, however, is that apart from the particular facts of this case, a rule requiring the retroactive taint of

Even if the officers had thought that their arrest of respondent would probably be held unlawful, however, and had engaged in a sophisticated calculation of the likely costs and benefits of that action employing our analysis, it seems highly unlikely that they would have made the arrest rather than pursue their investigation by other means. They would know that if they made the arrest they might well lose the benefit of any statement made by the suspect (cf. *Brown v. Illinois*, *supra*), as well as any pre-trial identification or any evidence found on his person, and might also incur substantial civil liability. While their action might result in an in-court identification by the victim many months later, that is hardly a prospect they could rely on with confidence in view of the well-known vagaries of witnesses and the impeachability of identification testimony.¹⁹ If some unconstitutional act were the only way of realizing that benefit, there might be sufficient incentive to overcome the significant risks. But in this case, and in most cases of this kind, other means were available by which the officers could have obtained respondent's photograph, or otherwise had Owens identify him, that would have been lawful and relatively easy.

lawfully acquired evidence is not likely to have a significant incremental deterrent benefit even in cases where the police themselves believe that a particular course of conduct would be found unlawful.

¹⁹ See *Manson v. Brathwaite*, *supra*, 432 U.S. at 113, n.14; *McGowan*, *supra*, 12 Wm. & Mary L. Rev. at 241.

Our point here is not that the police *would* inevitably have refrained from detaining respondent.²⁰ It is rather that in cases where the police themselves believe that their intended course of action would be unlawful, a rule requiring the suppression of the independent identification testimony of witnesses (or

²⁰ In view of the purposes of the exclusionary rule, it is obviously not material that evidence unlawfully acquired *could* have or *might* have been obtained by lawful means. But in cases where it is shown that the challenged evidence would inevitably have been discovered, many courts have held that the exclusionary rule does not require suppression. See *Brewer v. Williams*, 430 U.S. 387, 406 n.12 (1977), in which the Court indicated that on retrial the *corpus delicti* "might well be admissible on the theory that the body would have been discovered in any event." See also *United States v. Cole*, 463 F.2d 163, 171-174 (2d Cir.), cert. denied, 409 U.S. 942 (1972); *United States v. Falley*, 489 F.2d 33 (2d Cir. 1973); *United States v. Seohnlein*, 423 F.2d 1051 (4th Cir.), cert. denied, 399 U.S. 913 (1970); *Government of Virgin Islands v. Gereau*, 502 F.2d 914, 927-928 (3d Cir. 1974), cert. denied, 420 U.S. 909 (1975); *Killough v. United States*, 336 F.2d 929 (D.C. Cir. 1964); *Wayne v. United States*, 318 F.2d 205 (D.C. Cir.), cert. denied, 375 U.S. 860 (1963).

The courts of appeals have applied the "inevitable discovery" doctrine cautiously and have required a strong showing by the government that, in view of the course of investigation, considered in light of normal investigative practices, the evidence would inevitably have been disclosed. The court of appeals rejected our argument that such a showing had been made here, on the grounds both that it would not adopt the inevitable discovery doctrine in its jurisdiction and that the record did not in any event establish the necessary showing (Pet. App. 28a-35a). In light of the latter conclusion, we do not rely on the inevitable discovery doctrine itself. We do contend, however, that the availability of alternative means of obtaining a victim's identification in this case and generally are relevant considerations to the proper application of the exclusionary rule.

other evidence lawfully acquired) in addition to the ordinary fruits of that action is not likely to provide a generally significant increment of deterrence. Cf. *United States v. Ceccolini*, *supra*, 435 U.S. at 276.²¹

2. The Costs of Exclusion Under the Theory of Retroactive Taint Are Excessive.

While the incremental deterrence benefits to be derived from adoption of the court of appeals' theory of retroactive taint are limited and speculative, its potential costs to the sound administration of justice and to law enforcement threaten to be substantial—and, what is especially significant here, to be disproportionate to the benefits in a way that is manifestly not the case with the conventional fruits doctrine heretofore applied by this Court. Its consequence in this case is to prevent the victim of a crime from

²¹ In *Ceccolini*, the Court made a similar point when it noted that a rule requiring the suppression of the testimony of a witness who was discovered as the result of an unlawful search but who was willing to testify was likely to have less of a deterrent effect than the ordinary suppression of tangible evidence. The Court said (435 U.S. at 276; footnote omitted): "The greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means and, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness." Although this case is different because the witness was known to the police before any illegal act (and for that reason, we submit, supports a general rule of admissibility that the Court declined to fashion in *Ceccolini* (see 435 U.S. at 274-275)), the point made by the Court is even more applicable in this context. When the only object of the police action is to obtain the physiognomy of a suspect (or a photographic reproduction of it), the likelihood that that could or would be obtained by legal means is extremely high, and the incentive to obtain it by unlawful means is correspondingly low.

testifying against her assailant—a result that most courts, understandably, have found to be unacceptable. See note 12, *supra*. But, as we have noted, the theory of retroactive taint, if accepted, would have implications far beyond the results of this case.

First, that theory cannot be limited to identification testimony, but logically includes any information lawfully acquired by the police that becomes linked to the defendant or acquires prosecutorial utility as a result of some subsequent misconduct. Suppose, for example, that in the course of a burglary the burglar inadvertently drops his wallet containing a photograph of himself (or leaves a fingerprint or any other potentially identifying evidence), which the police promptly discover in investigating the burglary. Months later the burglar is unlawfully detained (either in connection with the burglary investigation or some unrelated matter), and in the course of the detention the police notice that he matches the photograph found at the scene, and for that reason they arrest him and bring him to trial. Under the court of appeals' theory, the photograph (and testimony about how and where it was discovered) could never be admitted at trial because its very presentation in evidence and its prosecutorial utility were "made available to the government through "a process initiated by [an] unlawful act" (Pet. App. 20a).

Although the court of appeals did not expressly say so, that is the necessary consequence of its rationale, because Owens' knowledge of the appearance

of her assailant is analytically no different from the photograph in the example. In both cases the police lawfully acquire information that they know to be of potentially identifying value, but they do not know the identity of the person whom it matches; and in both cases it is the unlawful detention that enables the police to match that information to the defendant.

Moreover, the evidence that is tainted under the court of appeals' theory of fruits would seem to be permanently tainted. At least it is difficult to see any rational or workable principle by which Owens' knowledge of the robbery and of the appearance of the robber could, after respondent was detained and she identified his photograph, ever be lawfully acquired or utilized. Indeed, the court of appeals in effect acknowledged the permanency of its theory of taint in rejecting the government's argument that any taint was attenuated by the lapse of time between the arrest and the trial testimony and by other events during that period (Pet. App. 38a-39a):

[W]hile the initial arrest and the taking of the photograph did occur on January 9, 1974, the illegality in this case did not end on that date. The eventual re-arrest and confinement of Mr. Crews and his ultimate appearance at trial were all based on tainted facts (the government demonstrated no independent basis for re-arrest). Thus, the entire course of events was accomplished in violation of the Fourth Amendment.^[22]

²² Apparently seeking to mitigate the conclusion that it was in fact permanently suppressing the defendant, the court suggested that Owens' testimony might have been admissible if,

In short, the logical implication of the court of appeals' theory is permanently to bar all evidence acquired by the police whenever some misconduct helps to connect it to the defendant and thus leads to its presentation in court.

It is true that in some cases applying ordinary exclusionary rule principles, the suppression of an item of evidence may as a practical matter preclude successful prosecution. But at least the exclusion of evidence discovered or acquired by virtue of an illegal search or seizure has a limited scope that can be accepted as in some sense proportional to the conduct sought to be deterred; it only reaches forward from the illegal act, and its impact in appropriate cases

after the January 9 arrest and subsequent photo identification, there had been "an identification of the accused by the same witness after a lawful arrest on another charge, or an identification by the same witness to a different team of detectives who had included a lawfully obtained picture of the accused in a standard photographic array" (Pet. App. 24a). This statement seems to suggest that, after the events of January 9, the police could have untainted Owens' knowledge of the crime by following respondent around until he committed some infraction for which he could be arrested, or by having "a different team of detectives" find (or perhaps take) some other photograph of respondent and show it to Owens in a standard array. If, as would almost invariably be the case, such further police activities were motivated by their belief, based on the tainted identification of the photograph, that they had the right man, it is hard to believe that the court of appeals would have found the taint removed. If it would, there would seem to be little point in suppressing her testimony in this case; if the suppression of her testimony is to have any point, it is difficult to see any rational grounds for ever admitting that testimony, or any other evidence tainted under the same theory.

can be ameliorated by principles of attenuation and independent source, principles that do not readily apply to a theory of retroactive taint.²³ Under the court of appeals' theory, in contrast, police officers can develop substantial information in a case, perhaps through a long and scrupulous investigation, only to have it all tainted through some later or unrelated event that helps connect it to the culprit. In such cases, it seems to us unreasonable to expect the police (or the public) to perceive the suppression of such evidence as proportional to the infraction.²⁴

²³ See pages 17, *supra*; 48-49, *infra*.

²⁴ A due concern for restraint and proportionality has influenced the judicial response to cases—analogue yet analytically distinct from retroactive taint cases such as the present case—in which an illegal search or seizure gives rise to police suspicion and prompts further investigation. When such investigation has been lawfully conducted, and the sole taint relates to the manner in which suspicion was initially aroused, courts have generally been reluctant to suppress the evidence produced by such investigations. As Judge Learned Hand stated in the remand of *Nardone v. United States*, 308 U.S. 338 (1939), the government should not be required to show that an initial illegality “has not itself spurred the authorities to press an investigation which they might otherwise have dropped. We do not believe that the Supreme Court meant to involve the prosecution of crime in such a tenebrous and uncertain inquiry, or to make such a fetish [*sic*] of the statute as so extreme an application of it would demand.” *United States v. Nardone*, 127 F.2d 521, 523 (2d Cir.), cert. denied, 316 U.S. 698 (1942). See also *United States v. Friedland*, 441 F.2d 855, 860-861 (2d Cir.), cert. denied, 404 U.S. 867 (1971); *United States v. Cella*, 568 F.2d 1266, 1286 (9th Cir. 1977); *United States v. Sand*, 541 F.2d 1370, 1376 (9th Cir. 1976), cert. denied, 429 U.S. 1103 (1977).

More recently, however, the Ninth Circuit has ordered the suppression of evidence on the basis of the proposition re-

Furthermore, the impact of the court of appeals' theory of retroactive taint would not be confined to a relatively small class of unusual cases. It is standard and ordinarily appropriate police procedure to take photographs of arrested suspects to exhibit to witnesses or to retain in police files for possible future use, to place arrested suspects in lineups for identification by victims or eyewitnesses, and to conduct prompt post-crime showups of suspects arrested or detained shortly after an offense. If properly conducted, lineups, showups, and photo displays not only serve an investigative and evidence-gathering function, but often serve the interest of a detained suspect, who may be quickly released if the witnesses exonerated him.²⁵ Since there is always the possibility that an unlawful arrest or detention has preceded the use of the identification procedure, the court of appeals' theory of retroactive taint would exact a heavy price for error preceding the use of these routine and appropriate police procedures.

Finally, as we discuss more fully in Point III, *infra*, the theory of retroactive taint imposes particularly

jected by Judge Hand and its own prior decisions, and we have filed a petition for a writ of certiorari to review that question. *United States v. Humphries*, *supra*, petition for cert. filed, No. 78-1803. In *Humphries*, the court also suppressed the testimony of a witness on a theory that is the same in principle as that relied on by the court below, and our petition also presents that question for review.

²⁵ See, e.g., *Allen v. Estelle*, 568 F.2d 1108, 1112-1113 (5th Cir. 1978); *United States v. Coades*, 549 F.2d 1303, 1305 (9th Cir. 1977); *Russell v. United States*, 408 F.2d 1280 (D.C. Cir.), cert. denied, 395 U.S. 928 (1969).

onerous costs when its effect is, as here, to prevent the victim of a crime of violence from testifying against his or her assailant. To the citizen who has sought the protection of the law and vainly invoked the machinery of justice, considerations of the Fourth Amendment and its enforcement are likely to be eclipsed by more fundamental questions about the government's fulfillment of its part of the social contract. See *Stone v. Powell*, *supra*, 428 U.S. at 491.

3. *Considerations of Judicial Administration Counsel Rejection of the Principle of Retroactive Taint.*

We have argued above that the cost to society and law enforcement of adopting the court of appeals' theory of retroactive taint would outweigh any incremental deterrent effect that it might have. It would be possible to attempt to limit those costs by seeking to apply, on a case-by-case basis, principles of attenuation developed in other contexts. Under such an approach, the propriety of suppression would depend upon whether, in the particular case, the violation was more or less "flagrant"; whether it was "exploited"; whether time, the witness's "free will" or other "intervening" circumstances were deemed sufficient to break the causal chain; or in general whether suppression would be sufficiently likely to deter police officers faced with the same situation in the future from violating the law to outweigh the adverse consequences. In Point II, *infra*, we argue that application of those principles to this case (awkward though we believe the process to be) estab-

lishes that suppression of Owens' in-court identification testimony was not appropriate.

In our view, however, significant considerations of judicial administration weigh against such a case-by-case approach and in favor of recognition of a general principle that evidence obtained by or known to the police independently of an unlawful search or seizure is not a suppressible product of that search or seizure simply because it is thereby linked to the particular defendant. We advert here to the judicial energies that will be expended seeking to resolve the factual and legal complexities of an issue that by its nature will not readily submit to easily applicable standards of decision. As one commentator has observed, soundly in our view, the formulation of rules governing the suppression of evidence should reflect "a concern for the limits to which judicial machinery can sustain the time-consuming demands and stresses of solving complex fact problems which are collateral to ultimate questions of fact." Ruffin, *Out on a Limb of the Poisonous Tree: The Tainted Witness*, 15 U.C.L.A. L. Rev. 32, 78-79 (1967).

The application of attenuation factors is difficult enough in the ordinary context of evidence acquired subsequent to and indirectly as a product of an illegal search or arrest; the complexities of attempting to identify and weigh the factors in a context to which the attenuation principle itself does not readily apply is not worth the burdens of the effort. How can one meaningfully consider, for example, the length of time between the Fourth Amendment vio-

lation and the procurement of the challenged evidence when the latter precedes the former? Similarly, how can one ask whether independent, untainted factors have intervened sufficient to attenuate the causal chain between the violation and the evidence when there really is no causal path, either direct or attenuated, between the two? Furthermore, how can one meaningfully apply the factor of the witness's free will when the testimonial capability of the witness was already known to the police at the time of the violation?

Thus, while we believe, as we next discuss, that the decision below could be reversed on the basis of conventional attenuation analysis, such a course would leave litigants and courts to struggle in future cases with difficult and largely irrelevant (to the policies of the exclusionary rule) efforts to analyze causal chains, free will, flagrancy of violation, and so forth.

In similar contexts under the Fourth Amendment this Court has rejected a case-by-case approach and has adopted general principles precluding suppression without regard to the flagrancy of the particular violation, the subjective purposes of the police, or other particular circumstances of the case. See, *e.g.*, *Alderman v. United States*, 394 U.S. 165 (1969) (use of evidence seized in violation of rights of persons other than the defendant); *United States v. Janis*, *supra* (use in federal civil cases of evidence unlawfully seized by state officers); *United States v. Calandra*, *supra* (use of unlawfully seized evidence in

grand jury proceedings); *Oregon v. Hass*, 420 U.S. 714 (1975) (use of improperly obtained evidence for impeachment purposes); *Frisbie v. Collins*, *supra* (prosecution of unlawfully seized defendant). Those decisions are based in large part on the conclusion that a rule allowing the possibility of suppression in each context would, as a general matter, impose a cost far in excess of its incremental deterrent benefit, and implicitly on the conclusion that sound judicial administration does not warrant or require a particularized determination of the propriety and utility of suppression in each individual case. In our view, the same considerations of deterrence, social cost, and sound judicial administration warrant recognition of the principle that the exclusionary rule does not apply to cases where the challenged evidence was known to the police before the occurrence of some unlawful act that served only to link the evidence to a particular individual.

II. EVEN IF OWENS' IN-COURT IDENTIFICATION WERE PROPERLY DEEMED A "FRUIT" OF RESPONDENT'S DETENTION, IT SHOULD NOT HAVE BEEN SUPPRESSED

We have argued above that Owens' in-court identification is not a "fruit" of respondent's unlawful detention for exclusionary rule purposes, and that principles of attenuation developed by this Court in considering the relationship between a Fourth Amendment violation and subsequently acquired evidence are not readily applicable to previously obtained informa-

tion. If the Court disagrees with that submission, however, and concludes that Owens' testimony can be considered a "fruit" of respondent's detention for exclusionary rule purposes, established principles of attenuation (as best they can be applied), support its admission.

The considerations relevant to determining whether a taint has been attenuated have been set forth most comprehensively in *Wong Sun v. United States*, *supra*, *Brown v. Illinois*, *supra*, and, with specific reference to live witness testimony, *United States v. Ceccolini*, *supra*.

In *Wong Sun*, which dealt with incriminating statements made by the defendants after their unlawful arrests, the Court stated the general principle (371 U.S. at 487-488; citations omitted):

We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

In *Brown v. Illinois*, which also dealt with incriminating statements made after an unlawful arrest, the Court reaffirmed the principle of *Wong Sun* and refined the analysis by identifying a number of factors relevant to determining whether verbal evidence

is sufficiently attenuated to purge the primary taint (422 U.S. at 603-604; footnote omitted):

No single fact is dispositive. * * * The *Miranda* warnings are an important factor * * *. The temporal proximity of the arrest and the confession, the presence of intervening circumstances * * *, and particularly, the purpose and flagrancy of the official misconduct are all relevant.

In *Ceccolini*, the Court upheld the relevance of the *Brown v. Illinois* factors in determining the admissibility of the trial testimony of a witness whose identity and knowledge of the crime was discovered by the police as a result of an unlawful search. But in addition the Court stressed that a particularly relevant factor in the context of live-witness testimony is the free will of the witness in testifying (435 U.S. at 276-277). And it also emphasized that in that context, the "enormous cost engendered" by permanently disabling a witness from testifying about relevant matters warrants "the conclusion that the exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object." 435 U.S. at 277, 280.

In sum, application of conventional attenuation analysis calls for evaluation of four factors—temporal proximity between the violation and the acquisition of the challenged evidence; the presence or

absence of intervening events contributing along with the illegal search or seizure to its acquisition; the character of the violation in terms of its purpose and flagrancy; and the free will of the witness in the case of testimonial "fruits." In the case of live witness testimony, these factors are to be weighed in a fashion reflecting reluctance to suppress such evidence. We now consider these factors, in ascending order of importance to the proper disposition of this case.

1. *Temporal proximity.* The court of appeals characterized this as "the least influential element of attenuation analysis" (Pet. App. 39a), and, at least in the present context, we agree. In the conventional attenuation case, the initial illegality launches a chain of events that, with varying immediacy and directness from case to case, leads to discovery of the challenged evidence. The time span between violation and discovery of evidence will often correlate strongly with the foreseeability to the police that their misconduct would produce the evidence, and is thus material to the attenuation analysis. But where the evidence is not a product of the search, being already in the possession of the police, the temporal factor has no meaningful role to play.²⁶

²⁶ Since the "fruit" of respondent's detention was Owens' in-court testimony, it may be said that there was a delay of 3½ months between the violation and the benefit. Whether that time is long or short for attenuation purposes is difficult to say, but we do not rely upon it in any event, since we doubt it would play a significant role in influencing police behavior, which was here motivated primarily by the desire to obtain the suppressed pretrial identification.

2. *Intervening events.* As with temporal proximity, the absence of a meaningful cause-effect relationship here between the illegality and a subsequent discovery of evidence diminishes the utility of this factor in the attenuation analysis.

There is, however, one intervening factor, not specifically addressed by the court of appeals, that we think significant in supporting a finding of attenuation: the determination by the trial court that Owens' in-court testimony was reliable and independently based, and therefore not subject to suppression as a fruit of the tainted pretrial identifications. To the extent the police illegally arrest or detain suspects in an effort to obtain both pretrial identifications and eventual in-court testimony, they can have no assurance whatsoever that their actions will not result in losing both. Whether the in-court testimony will be available thus depends upon the outcome of an unpredictable subsequent event, the judicial determination of its independent reliability. Thus, this factor supports a finding of attenuation in the present case.

3. *Free will of the witness.* The court of appeals did not examine this consideration, although *Ceccolini* dictates that it be considered. Owens' willingness to testify regarding the circumstances of the crime and to identify her assailant is beyond dispute, and this factor thus weighs in favor of a finding of attenuation.²⁷

²⁷ The weight to be accorded this factor—which will always be present when the issue is suppression of the testimony of a victim—is debatable. When, as in *Ceccolini*, there is a conven-

4. *The character of the Fourth Amendment violation.* The attenuation factor that is least distorted by the absence of a conventional cause-effect relationship between the police misconduct and the challenged evidence concerns the character of the violation, in terms of its purpose and its flagrancy. In large part that is because this factor is pertinent not so much to the effort to identify the strength of the nexus between the violation and the evidence as to more general considerations of exclusionary rule policy. To the extent that a violation is neither purposeful nor flagrant, suppression of evidence on account of the violation is less likely to be viewed by society as legitimate and proportional to the wrong, and is also less likely to exert a beneficial influence upon future police behavior.

Although we have not contended that respondent's detention was based upon information amounting to probable cause or that it was sufficiently brief to have been warranted on less than probable cause under the *Terry v. Ohio* line of cases, it exceeded the line of permissible action, if at all, only marginally.²⁸

tional cause and effect relationship between the violation and the discovery of a witness, the factor is significant in part because the substantial likelihood that such witnesses will come forward in any event diminishes police incentives to employ improper means to discover them (see 435 U.S. at 276). When, as here, the police already know the witness's testimonial capability, it is more difficult to know how to weigh the factor of free will in the analysis.

²⁸ Had the detaining officers in this case read some of the recent decisions of the District of Columbia Court of Appeals, they might have been doubly surprised to learn that their

First, the information known to the police before they took respondent to the police station and on which their suspicions were based was substantial. Three victims of robberies at the same location and closely spaced in time had given the police a relatively detailed description of their assailant as a dark complexioned, smooth-skinned youth of about 16-18 years of age and of about 5'5" to 5'8" in height (A. 11, 31, 65-66). Three days after the second set of robberies, police officers saw a person fitting that description near the same location, asked him for his name and address, and were informed that "he [had] walked away from school" (A. 32-33). They did not detain him further at that time, but sought additional information from a tour guide, who tentatively identified respondent as the person he had seen "standing around" on January 3, the day of the Owens robbery (*ibid.*) The officers then approached respondent again and sought, unsuccessfully, to take

detention of respondent violated the Fourth Amendment. That court has held, soundly we believe, that it is reasonable and within the scope of *Terry* to detain a person stopped on reasonable suspicion—and if necessary to transport him to the scene of the crime—for the purpose of determining whether eyewitnesses can identify him. See *Franklin v. United States*, 382 A. 2d 20, 23 (D.C. Ct. App. 1979); *Cooper v. United States*, 368 A. 2d 554 (D.C. Ct. App. 1977); see also *United States v. Wylie*, 569 F. 2d 62, 70-71 (D.C. Cir. 1977). It is debatable whether the detention here was materially different. Even though the detention involved transporting respondent to the police station, as in *Brown v. Illinois*, and *Dunaway v. New York*, it nevertheless differed materially from both of those cases both in the degree of intrusion and in the reasonableness of the basis for the police action (see pages 51-55, *infra*).

his photograph at the scene; only then did they decide to take him to Park Police headquarters, where they photographed him, telephoned his school, and released him in less than an hour. Furthermore, the officers did not formally arrest respondent or charge him with any offense (A. 38), they did not question him about the robberies (Tr. 70-71), and respondent never objected to having his photograph taken (A. 41-42). In short, the reasons for the detention were substantial, the intrusion on respondent's constitutionally protected interests was relatively limited, and nothing in the circumstances of the case supports an inference that the officers were acting in willful disregard of what they understood to be their lawful authority.²⁹

The court of appeals did not disagree with what we have said about the circumstances of respondent's detention. Rather, it found conclusive in the respondent's favor, in considering this attenuation element, the fact that a specific purpose of respondent's

²⁹ Moreover, in addition to the information supporting the officers' suspicions of respondent, there was also a reasonable basis for their belief that the detention was authorized by respondent's statements indicating that he might have been a truant. While respondent disputed that the officers had reasonable ground to believe that he was a truant, and the officers admitted that their reason for taking him to Park Police headquarters was at least in part in connection with their investigation of the robberies (A. 37), nevertheless, at a minimum, the fact that respondent admitted that he had simply walked away from school is relevant in considering the reasonableness (or conversely, the flagrancy) of the officers' actions.

detention was to obtain his photograph for exhibition to the robbery victims. While we do not doubt that the presence of an investigative motive is a relevant consideration weighing against the prosecution in the attenuation analysis, we believe that the court of appeals erred in making it the sole criterion and in overlooking the equally important and distinct consideration of the flagrancy of the violation. Since most Fourth Amendment violations are prompted by an investigative purpose (*Ceccolini*, which involved a search apparently motivated by nothing more than idle curiosity, is most unusual), a consideration only of purpose will have the effect of eliminating this factor from the attenuation analysis in nearly all cases.³⁰

³⁰ *Brown v. Illinois*, *supra*, involved a violation of the defendant's rights that was both purposeful (*i.e.*, undertaken in the hope of obtaining a confession) and flagrant (*i.e.*, an extended seizure of the defendant's person, accompanied by other improper conduct, and justified by little more than hunch). If the Court had accepted the State's contention that *Miranda* warnings automatically attenuate any taint from an illegal arrest, its decision would have amounted to an open invitation to police to conduct arrests for interrogation wholly without regard to the existence of probable cause. In *Dunaway v. New York*, No. 78-5066 (June 5, 1979), while the conduct of the police was less offensive in certain respects than in *Brown*, the scope of the seizure of the defendant's person was similar in magnitude; indeed, the Court described the circumstances of the case as "virtually a replica of the situation in *Brown*" (slip op. 17). Where, as in both of these cases, the police conduct was both purposeful and flagrant, this factor obviously must be weighed against a finding of attenuation.

We do not believe that this Court intends to exclude from the attenuation analysis a meaningful consideration of the flagrancy of the violation, nor should it be excluded. To do so would risk severing the attenuation inquiry from the fundamental objectives of the exclusionary rule, which is not designed to deter all investigative efforts, but only those that infringe a citizen's constitutional rights. Where the conduct of the police is undertaken in good faith, without a recognition that it runs afoul of the Fourth Amendment, and in the face of substantial potential costs from other impacts of the exclusionary rule (see pages 31-36, *supra*),³¹ the relentless exclusion of all "derivative" evidence will accomplish little of value to the administration of criminal justice.

While it is of course true that good faith is not an automatic bar to the application of the exclusionary rule, the degree of flagrancy, or offensiveness, of a particular violation as an objective matter is a reasonable and relevant indicator of whether the officers were acting in willful disregard of what they understood to be their lawful authority, see *Michigan v. Tucker*, *supra*, 417 U.S. at 447, and is a consideration that deserves substantial weight in ruling upon questions of attenuation of taint, see *Brown v. Illi-*

³¹ In this respect the present case is sharply distinct from *Brown* and *Dunaway*, where admission of the confessions would have left police with little significant disincentive against taking suspects into extended custody for interrogation purposes.

nois, supra, 433 U.S. at 609-612 (Powell, J., concurring).

Finally, the court of appeals failed to heed this Court's admonition in *Ceccolini* that courts, in ruling on challenges to the testimony of live witnesses, should consider particularly the social costs of excluding that type of evidence, and that "the exclusionary rule should be invoked with much greater reluctance" (435 U.S. at 280) in the case of such testimony.³² The Court's judgment on this point reflects the even more unequivocal judgment of Congress. See 18 U.S.C. 3502 (discussed at pages 57-58, *infra*). Those costs are particularly extreme when what is to be suppressed is the testimony of a victim of a crime, who has reported it to the police for the very purpose of seeking justice and the protection of the law.

In sum, even if Owens' in-court testimony could be properly analyzed as a potential fruit of the poisonous tree, established principles of attenuation warranted its admission into evidence.

III. THE TESTIMONY OF THE VICTIM OF A CRIME SHOULD NOT BE SUBJECT TO SUPPRESSION UNDER THE FOURTH AMENDMENT EXCLUSIONARY RULE

Even if Owens' testimony is properly characterized as a non-attenuated fruit of respondent's detention, it should not have been suppressed. Rather, the Court

³² Whether other courts of appeals have fully heeded that admonition since *Ceccolini* is open to question. See *United States v. Scios*, 590 F.2d 956 (D.C. Cir. 1978); *United States v. Cruz*, 587 F.2d 277 (5th Cir. 1978); *United States v. Humphries*, *supra*.

should recognize a general exception to the exclusionary rule for the testimony of victims of a crime that is reliable and independently based on their recollection of the crime. The cost to society and the adverse impact on the administration of justice are too high to warrant the deterrent benefits, if any, of suppression of this kind of evidence.

Our position reflects the prevailing view of the courts of appeals on this question (see note 12, *supra*) and is aptly expressed in the opinion of District of Columbia Circuit in *Payne v. United States, supra*, 294 F.2d at 727:

The consequence of accepting appellant's contention in the present situation would be that [the witness] would be forever precluded from testifying against [the defendant] in court, merely because he had complied with the request of the police that he come to police headquarters and had there identified [the defendant] as the robber. Such a result is unthinkable. The suppression of the testimony of the complaining witness is not the right way to control the conduct of the police, or to advance the administration of justice. The rights of the accused in a case like the present one are adequately protected when the complaining witness takes the stand in open court, for examination and cross-examination. Cf. *Frisbie v. Collins*, 1952, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541.

In our brief in *Ceccolini*, which did not involve the testimony of a victim, we argued for a similar exception applicable to live-witness testimony generally.

The Court, although it held the testimony to be admissible for many of the reasons that we urged in support of a general rule, declined to adopt such a rule and concluded that a case-by-case approach is appropriate, at least with respect to the kind of testimony involved in that case. 435 U.S. at 274-275.

Granting the appropriateness of a case-by-case inquiry in considering the admissibility of the testimony of ordinary witnesses, a different rule is nevertheless desirable in the special case of the victim of a crime, particularly a crime of violence. Depriving such an individual of the opportunity to appear at the bar of justice and testify against the person who injured him threatens to produce a resentment and disrespect for the law far in excess of and different in kind from that which may be engendered in the case of more disinterested witnesses.

As this Court said in *Ceccolini* of live-witness testimony in general (435 U.S. at 277), "[r]ules which disqualify knowledgeable witnesses from testifying at trial are, in the words of Professor McCormick, 'serious obstructions to the ascertainment of truth'; accordingly, '[f]or a century the course of legal evolution has been in the direction of sweeping away these obstructions.' C. McCormick, *Law of Evidence* § 71 (1954)."

We note in this connection that Congress has unequivocally declared that testimony such as that of Owens in the present case is not to be excluded. 18 U.S.C. 3502 states:

The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under article III of the Constitution of the United States.

While this statute technically does not apply to the Superior Court of the District of Columbia, which is not an Article III court, and while we are not here contending that the statute overrides constitutionally based requirements of exclusion, Congress's view of public policy and of the requirements of the Constitution is significant and entitled to considerable deference from the courts. *United States v. Watson*, 423 U.S. 411, 416 (1976). Indeed, the legislative policy so clearly reflected in Section 3502 should carry particular weight when the question before the Court concerns the proper scope of the exclusionary rule, which involves a necessarily predictive assessment of incremental deterrent effects and adverse social and judicial costs of alternative formulations of the rule. Those policies have special force in the case of a rule proposing to deny persons who are themselves the victims of crime access to the machinery of justice. This Court has never done so, and should not do so now.

CONCLUSION

The judgment of the court of appeals should be reversed.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

RICHARD A. ALLEN
Assistant to the Solicitor General

FRANK J. MARINE
Attorney

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-777

UNITED STATES OF AMERICA,

Petitioner,

v.

KEITH CREWS,

Respondent.

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE RESPONDENT

SILAS J. WASSERSTROM
WILLIAM J. MERTENS
W. GARY KOHLMAN

Public Defender Service
451 Indiana Avenue, N.W.
Washington, D.C. 20001
628-1200

Counsel for Respondent

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BRIEF FOR THE RESPONDENT

QUESTION PRESENTED

Whether the Court of Appeals was correct in excluding identification evidence which was the fruit of a purposeful and bad faith Fourth Amendment violation designed to obtain precisely that evidence.

COUNTER STATEMENT

Respondent, then sixteen years of age, was indicted for two separate armed robberies, one allegedly occur-

ring on January 3, 1974, and the other on January 6, 1974, and both allegedly taking place in the vicinity of the Washington Monument. On April 22, 1974, the cases were tried jointly before a jury.

At the conclusion of the trial, respondent was found not guilty of all charges stemming from the January 6 robbery,¹ and guilty of the armed robbery of Ms. Carol Owens, the complaining witness in the January 3 robbery.

On appeal from that conviction, a panel of the District of Columbia Court of Appeals, over a dissent, affirmed respondent's conviction. (Gov. App. C). The Court of Appeals then considered the case *en banc*, and, with seven judges joining the majority opinion, reversed. (Gov. App. A).

1. Prior to trial, a hearing was held on respondent's "Motion to Suppress Identification." Respondent alleged in that motion that he had been illegally arrested and that all fruits from that arrest, including testimonial evidence concerning any identifications,

¹The government's theory was that the respondent committed both robberies in the Washington Monument area, one on January 3, 1974 and one on January 6, 1974. Ms. Carol Owens, however, the victim of the first robbery, described her assailant as clean shaven. Ms. Sandra Denner, one of the complaining witnesses in the January 6 incident, recalled her assailant as having a moustache. She was never able to identify respondent as her assailant.

Respondent took the stand and denied his involvement in both incidents. A friend of his, Mr. Philip A. Smith, testified that on January 6, 1974, he had been with the respondent at a movie theatre at the time when the robbery allegedly took place. Respondent testified that on January 3, 1974, at the time the first robbery allegedly occurred, he was participating in a pick-up basketball game.

should be suppressed.

At the hearing, Officer David Rayfield, a member of the United States Park Police, testified that on January 9, 1974, at approximately 12:10 p.m., while working in the Washington Monument area, he noticed a Negro male approximately three hundred feet from the concession stand near which the officer was standing. Officer Rayfield testified that he and his partner were aware of robberies in the Washington Monument area on January 3 and again on January 6, and aware that the alleged perpetrator had reportedly been described as a Negro male, 15 to 18, with a slender build and light complexion. Tr. at 49.²

Officer Rayfield was "suspicious" of the Negro male (respondent) he observed on January 9 because "he matched the description to some degree of the person" allegedly involved in the robberies. Tr. at 52. His "suspicion" was "enforced [sic]" after he learned from a tour guide that he thought that respondent looked like a person who had been around the Washington Monument at some time on January 3. Tr. at 64.³

²The pagination in the transcript runs consecutively from the first day of the hearing on the Motion of Suppress to the conclusion of the trial.

³The government incorrectly states that at trial the tour guide, Mr. James Dickens, positively identified respondent as having been near the Monument on January 3. Brief for the United States Government (hereinafter, Brief), at p.4, n.2. In fact, he said he "thought" respondent was the same person and he was "almost" positive. The trial testimony to which the government refers reveals Mr. Dickens, who was not a witness to the January 3 robbery and is blind in one eye, to have been a less than compelling witness. He testified that the person he saw on January 3 resembled a man he knew who was well over 7 feet 10 inches tall. Looking at respondent in the courtroom, he estimated him to be "pretty close to 5 feet." Tr. at 125-130.

Solely on the basis of that information, the police officers placed respondent under arrest as a suspected truant.⁴ They then notified Detective Carl Ore, the Metropolitan Police officer investigating the two robberies, of the arrest. Tr. at 53. Respondent was detained by the two Park Police officers for ten to fifteen minutes, awaiting Detective Ore's arrival. Once Detective Ore arrived, an attempt was made to photograph the respondent. *Id.* Officer Rayfield testified that this was done because it is the customary procedure for arrested truants.

Detective Ore testified that at approximately 11:30 a.m., on January 9, 1974, he received a call from two Park Police officers relating that they had "contacted a man . . . [who] resembled the description that was given in a robbery lookout." Tr. at 59. Detective Ore drove to Fourteenth and Madison Streets where the suspect, respondent, had been arrested. Contrary to Officer Rayfield's explanation, Detective Ore stated that he attempted to photograph the respondent to obtain pictures "to show . . . to the complaining witnesses" in the two robbery incidents. *Id.* Because of the rain he was unable to "interview" or "photograph" the respondent and Detective Ore therefore ordered the arresting officers to take him to Park Police headquarters "for interrogation and processing." *Id.* All tolled, respondent was kept at headquarters for approximately one hour. At the station, he was searched, fingerprinted and photographed. Tr. at 60. While

⁴In the District of Columbia, children 15 years and younger are required to attend school. D.C. Code §31-201 (1973). Respondent accurately told the police that he was 16 and that he had been in school earlier that day.

respondent was under arrest, the police called his school to ascertain his whereabouts on January 3 and 6, the dates of the robberies. They made no effort to determine whether he was a truant on January 9, the day of the illegal arrest. Respondent was never formally charged with truancy.

Detective Ore testified that the pictures taken at the Park Police headquarters were eventually displayed to Ms. Carol Owens, the complaining witness in the first robbery, and she identified the respondent as the person who had taken ten dollars from her on January 3. Tr. at 62.⁵ Based on that identification, respondent was once again arrested and charged with armed robbery. Thereafter the complainant went to a lineup and again identified respondent as the person who had robbed her on January 3. Tr. at 62.

At the conclusion of the suppression hearing, the trial court found that the lengthy detention of respondent at Park Police headquarters constituted an arrest and was illegal because there was no probable cause. The trial court's finding was a clear rejection of the arresting officer's testimony that he had arrested respondent for truancy and not as a robbery suspect and constituted a finding that the sole purpose of the arrest was to obtain respondent's photograph in order to generate identification evidence. The court further ruled that the photographic and lineup identifications were fruits of the illegal arrest and thus inadmissible. The court determined, however, that the government

⁵The pictures were also shown to the complaining witnesses in the January 6 robbery, one of whom identified respondent and one who identified both respondent's picture and a second picture as possible suspects.

would be permitted to introduce testimonial evidence of an in-court identification of the respondent by the witness. That in-court identification was the sum total of the evidence linking respondent to the crime.

2. A panel of the District of Columbia Court of Appeals affirmed over a dissent. The majority agreed that the illegal arrest was a "significant invasion of [respondent's] constitutionally protected interests" (Gov. App. 75a), and would not "approve... the officer's investigatory tactics" (Gov. App. 79a), but determined that the in-court identification was not a fruit of the police misconduct. Judge Fickling, in dissent, found that the arrest was "made in bad faith, without probable cause... for the purpose of obtaining identification evidence..." (Gov. App. 86a). He therefore concluded that the deterrent rationale of the exclusionary rule compelled exclusion of all fruits of the illegality, including any testimony concerning an in-court identification:

Here, the illegal arrest of [respondent] for the sole purpose of obtaining and exhibiting his photograph to the robbery victims, with a view toward having any resulting identification duplicated at trial, is clearly an exploitation of the "primary illegality." *United States v. Edmons, supra*. See also *Davis v. Mississippi*, 394 U.S. 721 (1969); *Bynum v. United States*, 107 U.S. App. D.C. 108, 274 F.2d 767 (1960). Such an illegal arrest made for the precise purpose of securing identifications that otherwise would not have been obtained epitomizes, in my view, the evils sought to be prevented by the exclusionary rule. *Id.*

The Court of Appeals *en banc* reversed with seven judges joining the majority opinion. Noting that the

government was not contending otherwise, the Court accepted the trial court's finding that respondent was arrested without probable cause:

[T]he trial judge's conclusion was correct on the facts. Keith Crews' presence at the scene of the robberies, his minimal resemblance to the quite general description of the assailant, and his weak, very tenuous identification by tour guide Dickens, did not constitute probable cause to believe that he had participated in the robberies and assaults. (Gov. App. 19a)

The Court then concluded that the prospective fruit that respondent wanted suppressed, an in-court identification by complainant Owens, was causally connected to the illegal arrest:

[T]he unlawful arrest produced photographs which were shown to the complaining witnesses who, as a result, identified [respondent]; this resulted in his reapprehension, which yielded a court-ordered lineup identification, and, eventually, in-court identification testimony during prosecution of the case. (Gov. App. 20a-21a.)

The Court then turned its attention to whether the government had shown the fruit to be attenuated from the illegality. Relying on *Brown v. Illinois*, 422 U.S. 590 (1975), and *United States v. Ceccolini*, 435 U.S. 268 (1978), for guidance, the Court correctly observed that "the character of the official impropriety is the most germane of the attenuating variables." Gov. App. 45a. Examining the facts before it, the Court found that the misconduct was purposeful and that the police acted in bad faith because they knew they did not have probable cause to arrest:

[Respondent] Crews' was intentionally subjected to an investigatory arrest for the very purpose of obtaining identification evidence. . . . The remarkable parallels to the offending police activity in *Brown v. Illinois, supra*, are noteworthy. In that case, as this,

[t]he impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was "for investigation" or for "questioning". . . . The detectives embarked upon this expedition for evidence in the hope that something might turn up. (Gov. App. 48a).

Given the clear, investigative purpose of the arrest and the demonstrated bad faith of the officers in making an arrest when they knew they had no basis for it, and the failure of the government to show that the fruit was attenuated from the illegality, the Court of Appeals concluded that the deterrent purpose underlying the exclusionary rule required that the in-court identification be suppressed:

We believe that fidelity to the Constitution mandates our disapproval of the official misconduct which was designed to lead—and did lead—to the identification evidence in this case. We reject the notion that mere suppression of the photographic and lineup identification testimony, but not the in-court identification, would somehow be an adequate deterrent sanction in this case. This conclusion could only result from the untenable assumption that a sufficient disincentive results when the police are prohibited from enjoying

some, but not all, of the products of their wrong.⁶ (Gov. App. 52a).

The two dissenting judges agreed that "there is no question but there . . . was no probable cause for [respondent's] seizure [and] [t]hus his Fourth Amendment rights were violated." (Gov. App. 58a.) They also agreed that the out-of-court identification should be suppressed as fruits of the misconduct. They disagreed with the majority only with respect to the admissibility of the in-court identification.

SUMMARY OF THE ARGUMENT

In the early afternoon of January 9, 1974, U.S. Park Police officers investigating two robberies that had occurred several days before on the Washington Monument grounds came upon the respondent in that general area. Although they knew that they lacked probable cause to arrest the respondent,⁷ they did so anyway for

⁶The Court also noted that its decision was in harmony with the "imperative of judicial integrity" that the Court referred to in *Elkins v. United States*, 364 U.S. 206, 222 (1960):

We therefore rely secondarily upon the preservation of the integrity of our judicial system in ordering suppression of the courtroom identification of appellant. We accept judicial integrity as a still vital supplementary rationale whose cogency is closely related to that of deterrence in a given case. (Gov. App. 54a, n.39)

⁷Many of the arguments which the government makes in its brief are premised on its assumption that the officers here were not acting "in willful disregard of their lawful authority." Brief at 52. This premise is belied by the facts, and the Court of Appeals unquestionably found that the officers were acting in bad faith. Such a finding is implicit in the trial court's ruling as well. While the government ignores this finding in its analysis, respondent does not understand the government to be challenging it.

the specific purpose of taking his picture to show to the victims. He was transported to police headquarters, searched, fingerprinted and photographed and, about an hour after his arrest, released. Some days later, police displayed the photograph to two of the victims, and both identified the respondent as their assailant. Solely on the basis of that identification, the respondent was arrested again. He was ordered to stand in a lineup and again he was identified. On this evidence, the respondent was indicted and brought to trial.

Before trial, the respondent moved to suppress the identification of him by the victims, arguing that all such identification evidence was the fruit of his earlier, illegal arrest. The trial court agreed that the arrest was illegal and accordingly ordered the out-of-court identifications suppressed, but it permitted the government's witnesses to attempt to identify respondent in court. On the basis of an in-court identification by Owens, the respondent was convicted of one count of armed robbery. He was acquitted of the other.

In a carefully reasoned opinion, the Court of Appeals, sitting *en banc*, analyzed the case, as this Court's opinions teach, from the standpoint of deterrence, and applied traditional "fruit of the poisonous tree" principles to the challenged evidence. It concluded that the in-court identification was a final link in a causal chain that began with the respondent's illegal arrest: an arrest which the Court found to have been made in bad faith and for the intended purpose of acquiring precisely the evidence which the respondent challenged in his motion to suppress. The Court then went on to consider whether any factors broke this causal chain, and found that the government had failed

to show the existence of any source for the challenged evidence which was independent of the initial illegality. Indeed, as the Court pointed out, the government never proffered any legally acquired evidence whatever. The Court also found that the government had failed to show any attenuation in the nexus between the in-court identification and the respondent's initial arrest. The Court concluded that it is in just such a case as this—where the challenged evidence was the direct and intended consequence of purposeful, bad faith police misconduct—that the exclusion sanction is most clearly mandated, for it is in just such a case that the police are most deterrable, and deterrence is most imperative.

The Court of Appeals was surely correct. Its analysis and its conclusions are clear and unimpeachable. This is doubtless why the government, in its brief, refuses to confront that opinion on its own terms. Instead, it argues that while the Court of Appeals' analysis may seem straightforward and conventional, really it is not; for unbeknownst to that Court, it was adopting a perverse and implausible theory that lawfully obtained evidence may become tainted, *i.e.*, become a suppressible fruit, by virtue of subsequent police misconduct. The government then goes on to devote the bulk of its brief to an attack on that theory, which it terms the theory of "retroactive taint," arguing at length that it generates results which are inconsistent with prior decisions of this Court, at odds with the deterrent policy that underlies the exclusionary rule, and unbounded by limitations of traditional attenuation analysis.

What the government does, then, is to spin out its own theory of "retroactive taint," ascribe it to the

Court of Appeals, and then urge this Court to reverse the Court of Appeals on the basis that evidence which is tainted only retroactively should never be suppressed. Only then does the government go on to address itself to the Court of Appeals' decision in this particular case, arguing that the result reached is itself an example of the counterproductive application of the "retroactive taint" theory, reversible even under a conventional attenuation analysis.

The government's attack, then, is primarily from the flank. Its success requires it to show that the result reached by the Court of Appeals really does rest on a theory that lawfully obtained evidence may be "tainted" by subsequent police misconduct, and that here it was precisely such evidence that the Court of Appeals did suppress.

This argument is confronted with a substantial obstacle. The Court of Appeals clearly did not think that it was adopting any new theory at all, but, rather, that it was applying standard "fruit of the poisonous tree" principles in a perfectly straightforward way. Moreover, the opinion seems to be no more—or less—than a reasoned application of those principles to reach a manifestly correct conclusion. Since there is nothing askew with the legal analysis, the government suggests that there is a quirk in the facts of this case that led the Court of Appeals astray. But as respondent will show in Part I of his brief, it is only the government's perverse and untenable way of characterizing the facts, and nothing inherent in the facts themselves, that is peculiar here. Respondent will show, in other words, that the Court of Appeals' decision is just what it appears to be—the carefully reasoned result of the

correct and meaningful application of traditional "fruit of the poisonous tree" principles to a perfectly conventional set of facts⁸ that cry out for the exclusionary rule's application—and that the government's argument, which is centered around a notion that this case involves the application of the "retroactive taint" theory, is baseless.

That argument, in the government's bizarre language that would do a medieval scholastic proud, goes like this: (1) the "evidence" which was suppressed here was not, as it would seem, Owens' in-court identification of the respondent, but rather, her "ability to identify" the respondent as her assailant; (2) the police "knew" that she had this "inchoate ability" before they illegally arrested the respondent. Because they "knew" she had this "inchoate ability," and because "inchoate ability" is evidence, they had "obtained" that "evidence" prior to the arrest; therefore, (3) that lawfully obtained evidence was suppressed on the theory that it was "retroactively tainted" by the later misconduct. While the misconduct may, admittedly, have served to impart "prosecutive utility" to that "evidence," this kind of nexus to the evidence is not susceptible to analysis under traditional fruits principles and is an inappropriate nexus on which to base the exclusionary sanction.

As respondent will show, the government's first premise—that what was suppressed was "Owens' ability to make an identification"—rests on a distortion of the opinion of the Court of Appeals. In fact, the evidence

⁸The only thing unusual about the facts is that they so clearly demonstrated the bad faith and flagrancy of the misconduct when the police arrested respondent knowing they lacked probable cause.

suppressed here was an in-court identification that manifestly followed, and was generated by, the illegal arrest. Respondent will show that the government's second premise—that the “inchoate ability” to make such an identification was “evidence” which had been “obtained” by the police before the police misconduct occurred—is a perverse and useless way to describe the facts of this case. Indeed, if the facts are described in this way, then all fruits issues are transmuted into ones involving an alleged retroactive taint.

Moreover, the elaborate terminology and array of metaphysical constructs which the government deploys here in its prodigious effort to distort this case into one that seems to involve a “retroactive taint,” needlessly confound and confuse the correct analysis of fruits issues. For if an “ability to testify” is the same as testimony, and if even “inchoate abilities” constitute “evidence,” then the link between official misconduct and the challenged evidence will always involve imparting “prosecutive utility” to that evidence in some way. And, of course, all Fourth Amendment exclusionary rule cases involve the issue of whether the suppression sanction should be applied to deprive the government of the “prosecutive utility” of the evidence challenged as a fruit of official misconduct. Now, courts resolve that fruits issue by applying conventional attenuation and independent source principles to determine whether the challenged evidence is connected to the official misconduct in such a way that the suppression sanction of the exclusionary rule is both appropriate and likely to be efficacious. The government's new vocabulary would require courts to apply the exact same analysis, though the causal nexus would be discussed in terms of the illegality and the “prosecutive utility” of the challenged evidence. For facts are stubborn things; they

do not change simply because they are described differently, nor does the purpose of the fruits inquiry. The government's queer terminology simply makes that inquiry more abstruse and recondite.

The correct resolution of this case⁶ is so clear, however, that even the government's nomenclature can not obscure it. After all, an effort to transform the witness' “inchoate ability” into actual evidence with “prosecutive utility” is what the misconduct here was all about. When the police arrested the respondent, they had virtually no evidence against him; that, of course, is what made the arrest illegal in the first place. It was precisely because they hoped to develop evidence with “prosecutive utility” that they went ahead and made the investigative arrest anyway. That bad faith arrest without probable cause generated precisely the identification evidence which the officers were seeking when they made it. The purpose of the illegal arrest was to obtain the very identification evidence which respondent challenged as its fruit, and without that illegal arrest the government would have had no evidence at all. As the Court of Appeals convincingly explained, the deterrent purpose that underlies the exclusionary rule manifestly requires its application where, as here, the challenged evidence was the intended fruit of the police misconduct. This is so no matter how the facts are described.

It is only in the deep recesses of its brief, that the government takes on the Court of Appeals decision on that Court's own, perfectly straightforward terms. As respondent will show in Part II of this brief, the battle is a rout—and not, as the government would have it, because the Court of Appeals did not fight fair by finding a “retroactive taint.” Rather, as respondent will show, it is because the deterrent rationale which

underlies the exclusionary rule so clearly compels its application to the in-court identification here and because perfectly conventional fruit of the poisonous tree principles so clearly demonstrate that this identification was an unattenuated fruit of the police misconduct.

Finally, in Part III, respondent will show that a *per se* exception to the exclusionary sanction for eyewitness testimony of the victims of crimes, would be arbitrary, unprincipled, and fundamentally different from any of the limitations on the reach of the exclusionary sanction which this Court has ever before announced.

I.

THE COURT OF APPEALS' DECISION DID NOT INVOLVE THE APPLICATION OF A "RETROACTIVE TAIN" TO EVIDENCE LAWFULLY OBTAINED BY THE POLICE PRIOR TO THEIR MISCONDUCT.

Undoubtedly because it cannot prevail through straightforward application of "fruit of the poisonous tree" analysis, the government resorts to a new metaphorical doctrine of its own creation, "retroactive taint," which, it claims, the Court of Appeals itself unwittingly adopted. In fact, however, this case was decided on no such theory, and neither the reasoning nor the holding of the Court of Appeals suggests that it was. Indeed, the government's "basic submission" here—that this case involves the suppression of lawfully obtained evidence only "retroactively tainted" by subsequent police misconduct—is but an elaborate straw man. Whatever the actual implications of the phrase "retroactive taint," and whatever the wisdom of suppressing previously acquired evidence on account of

subsequent police misconduct, this case simply involves no such issue.

The government's effort to depict this as other than a garden variety fruit case begins with the assertion that the evidence challenged here is "Owens' *ability to identify* respondent as her assailant." Brief at 11 (emphasis supplied). From this premise it argues that since this latent ability was based on the complainant's "knowledge of the appearance of her assailant" and "was known to the police before any illegal act on their part," there necessarily could be no causal connection between the acquisition of the evidence and the police misconduct.⁹

⁹The government could as well be saying that a farmer "possesses" an apple because he owns a patch of land which may or may not be fertile. This can be said, of course, but it is certainly a strange use of the word "possess". We can even go on to say that if the farmer then buys seed, plants it, and harvests the apples, they are not the fruits of his labor because his actions only imparted "agricultural utility" to the land which proved to have an "inchoate capacity" to bear fruit. We can describe the facts in this way, but whether it is helpful to do so depends on our objective. If we are a potential buyer of the farmer's apples, and we want to deter him—and other farmers—from stealing seeds, then, much as we like apples, it may be an effective deterrent to refuse to buy those apples which are grown from stolen seeds. We should make our judgment about the likely effectiveness of this response in light of the farmer's actual connection to the growing of the apples, regardless of how that connection is described. What he has done is the same whether we say, straight out, that he stole the seeds and planted them, or, more obscurely, that he only imparted "agricultural utility" to the land. But if his connection is described in this peculiar way, then we have to ask another question, how did he impart that utility? When we then find out that he did it by stealing the seed and planting it, our response to it should be the same. And, of course, the actual effectiveness of our response, as a

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This faulty premise concerning the nature of the evidence suppressed becomes the springboard from which the government leaps to the conclusion that the only function that the respondent's illegal arrest served was to "giv[e] prosecutive utility to evidence already possessed by the police," Brief at 17, and hence to the further conclusion that

[u]nder the view of the court of appeals, . . . any evidence linking the defendant to the offense is a potentially suppressible "fruit" of an illegal arrest or detention precisely because that action enabled the investigating officers to realize that the defendant is indeed the culprit. Brief at 18.

The government then exhibits a parade of horrors as purported examples of the intolerable results to which, it says, this "view" that it attributes to the Court of Appeals, would lead.¹⁰ Brief at 22, 37-41.

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deterrent, will not be changed one wit by the way we have described the facts. But if the farmer were to use this outlandish vocabulary to argue that it was inappropriate to exclude his apples from the market because he possessed apples in inchoate form before he even stole the seeds for them, and that thus there was no casual connection between his actions and the apples themselves, we would just laugh.

¹⁰Further along in its brief, the government goes on to suggest that the Court of Appeals cast aside, as excess baggage, the limiting doctrines of independent source and attenuation and embraced a "but for" test for causation; if, "but for" the illegality the evidence would not have been presented, then it should be suppressed:

Under the court of appeals theory, the photograph [of the burglar in the government's hypothetical] and testimony about how and where it was discovered, could never be admitted at trial because its very presentation in evidence and its prosecutorial utility were "made available to the

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The premise for this argument, the government's "basic submission" here, Brief at 18, is, however, demonstrably unsound. Suppressed fruit in this case came into existence only after, not before, the illegality. Indeed, the lower court's analysis was the same as that employed by this Court and lower courts in numerous other cases.

As a threshold matter, it is not easy to discern how "Owens' *ability* to identify the respondent as her assailant" is evidence at all. To be sure, Owens' anticipated testimony as to the circumstances of the offense and her opportunity to observe her assailant

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government through a process initiated by [an] unlawful act," Brief at 37.

Nothing could be further from the truth, and the government's ability to make the argument is dependent upon wrenching this single sentence out of the context. In fact, the quoted portion is not a conclusion reached by the Court of Appeals, but rather, a paraphrase of the respondent's averment of factual causation. The Court of Appeals made it unmistakably clear that even after such causation is found the issues of independent source and attenuation remain:

An affirmative answer to the causation question, however, by no means ends the discussion about exploitation of the illegality. (Gov. App. 25a).

As the respondent will show in Part II-B of his brief, the Court did in fact go on to apply attenuation and independent source principles in a perfectly straightforward way. This is why the government's suggestion on page 41 of its brief that the logic of the Court of Appeals would lead it to suppress identification evidence flowing from identifications of photographs taken after unlawful arrests in other offenses, is patently absurd. It depends on the erroneous assumption that this is a "retroactive taint" case and that, as such, the test for exclusion must be one of "but for" causation.

constituted prospective evidence, but characterizing her "inchoate capacity" to make an identification is a much more problematic venture.¹¹ But however one describes

¹¹In ordinary language, we may use the term "ability" as the verbal equivalent of a prediction about a person's future success at some endeavor: when we say that Elvin Hayes has the "ability" to hit an open jump shot, we mean to say that when he tries to do so, he will succeed a substantial portion of the time, basing this prediction on his past success at the same effort. It is difficult to find any similar meaning for "Owens' ability to identify respondent", particularly when it is considered from the relevant perspective, that of the police before they arrested the respondent. Certainly they could not safely predict that Owens would recognize him as the culprit, as little as they knew to connect him with the offense. Nor does it help things to rephrase the characterization of the challenged evidence, as the government unwittingly does at one point, (Brief at 11), and call it instead "Owens' ability to identify her assailant," whoever he might be. In the first place, could any prediction that she would succeed be anything but pure speculation, before she actually viewed any suspect? Unlike the basketball player, whose future performance, one hopes, can be predicted with some measure of accuracy from his past, Owens had no past record from which to judge. Before she viewed respondent's photograph, the police, rather than possessing evidence, possessed at most hope.

In the second place, if this notion of "ability" implies the "ability" to identify the person who *in fact* assaulted her, rather than the mere ability to state with apparent sincerity that she recognizes a man, whether or not the person she is viewing is in fact the guilty one, then the existence of this "ability" is peculiarly self-verifying. The government now says that this ability exists and did so all along; but the evidence that Owens identified the right man comes only from the fact that she made an identification. Conversely, if the "ability" is the "ability to identify her assailant," does this mean that she could not be mistaken; that if she failed to identify a particular suspect he is, *per force*, innocent? What of the poor man about whom she is not sure? Moreover, to

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that "ability," it does not constitute evidence, and it is absurd to conclude that the police "possessed" it. The police could not be sure that Owens could identify anyone, let alone respondent; indeed, the witness herself could not know, until she viewed his likeness. If the police "possessed" this "evidence" in any meaningful sense, then, of course, the arrest here would not have been illegal in the first place.

Thus the government's premise, that the Court of Appeals unwittingly excluded "retroactively tainted" evidence, is unsound, for it is an unintelligible way to characterize what occurred in this case. More basically and importantly, such a characterization is altogether unnecessary. The Court of Appeals' opinion is perfectly sensible on its own terms, without reference to the seemingly perverse notion of "retroactive taint," which, the government says, would lead to unacceptable results in other cases.¹² The fruit that the Court of Appeals suppressed came into being after, rather than before, the illegality, and its link to the illegal arrest depends on no sweeping "prosecutive utility" theory such as the

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the extent that the police "possessed" Owens' "ability", they also "possessed" complainant Denner's "ability." Yet she was never able to positively identify respondent as her assailant. Does this mean that her "inchoate ability" did not constitute "evidence"? Or that it was "evidence", but the respondent is not the right man? Or does it mean that there is something inherently illogical about the government's attempt to equate "inchoate ability" with evidence?

¹²Cases decided by the District of Columbia Court of Appeals since its *en banc* decision in *Crews*, reveal that decision has not had the fearful consequences that the government foresees. See *United States v. Cunningham*, 391 A.2d 1360 (1978); *Douglas v. United States*, 386 A.2d 289 (1978) (decided while *Crews* was pending decision).

government describes. That fruit was not the witness' pre-existing "ability to identify respondent," whatever that might be; it was instead the actual in-court identification that she made at the respondent's trial. This fruit is no different in principle from numerous other fruits heretofore always thought suppressible. If the government's mode of analyzing this case were adopted generally, then the exclusionary rule doctrine would need to be rewritten from the ground up.

The most obvious and typical example of evidence that, on the government's imaginative analysis, could never be subject to suppression, would be criminal proceeds. An illegally arrested accused could never succeed in suppressing the proceeds of a theft that had been seized from his person incident to that arrest. Such suppression would, by the government's lights, amount to the suppression of the complainant's ability to testify. Surely if Owens' "ability to identify" her assailant was "evidence available" to the police here, then so, too, would be the complainant's "ability to identify" his own property. On the government's theory, the arrest would merely link this previously acquired "evidence" to the defendant and would provide an opportunity for the complainant to identify the property from the witness stand. There, as here, suppression would involve the imputation of "retroactive taint."

For similar reasons, under the government's theory, the same defendant could never suppress testimony of a police fingerprint expert that the defendant's known prints matched latent prints found on the illegally seized proceeds. That expert's ability to testify, based as it would be on his prior training and experience,

existed before the illegal seizure. There, more clearly than here, this ability was already in police "possession." The police misconduct should, if the government is correct, be seen as merely "giving prosecutive utility to evidence already possessed by the police," and the exclusionary rule should not be applied, lest Pandora's box be opened.¹³

In fact, under the government's novel theory, virtually any case in which the suppression of tangible evidence is sought should now, it would seem, be viewed as involving a "retroactive taint."¹⁴ This would be so of cases involving proceeds, other property which witnesses might link to the crime, or evidence which can be linked to the crime by some kind of scientific analysis. In all such cases, suppression of the challenged evidence deprives the prosecutor of the use of other pre-existing "inchoate evidence" as well.

The present case no more involves "retroactive suppression" than any of the above examples, which

¹³Similarly, if the government's theory were correct, then *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), and cases involving similar kinds of evidence were decided on grounds that are in fact beside the point. At issue there was the admissibility of vacuum sweepings taken from the defendant's car, which matched similar sweepings from the clothing of a murdered girl. *Id.* at 496 (per Black, J.) From the government's perspective, this should have been an easy case; for the Court should have recognized that Coolidge was in fact seeking the "retroactive" suppression of the previously acquired sweepings from the victim's clothes. The later seizure of his car, whether legal or not, merely lent this other evidence its "prosecutive utility." No member of this Court, however, advanced such a construct as a basis for the decision.

¹⁴Even the illegal seizure of contraband, such as drugs, might result in the "retroactive taint" of an expert's pre-existing ability to identify it as such.

are, of course, representative of cases in which, for years, the courts have applied the exclusionary rule without loosing the brood of horrors that the government now conjures up. Indeed, *Davis v. Mississippi*, 394 U.S. 721 (1969), which the government attempts to turn to its own advantage, is arguably closer than the present case to what the government would call a case involving "retroactive taint." In *Davis*, this Court, suppressed fingerprints illegally obtained from a criminal defendant, and thus rendered substantially useless not merely an "inchoate ability," as the Court of Appeals did here, but pre-existing tangible evidence, namely latent fingerprint impressions left at the crime scene, as well.¹⁵

¹⁵A comparison of this case with *Davis* also highlights another point. In neither case will the evidence that is subject to the purported "retroactive suppression" necessarily remain "suppressed" forever. Contrary to the normal use of the term "suppressed," the possibility remains open that Owens, at a new trial, will be able to exercise her purported ability to identify her assailant if by then an independent source, in the Fourth Amendment sense, can be shown for that identification. Gov. App. 42a, n.31. Similarly, the prosecution in *Davis* could make relevant use of the latent print at a new trial, provided that it had a set of Davis' prints that were untainted by Davis' illegal arrest. Thus it is not very useful to view *Davis* as involving suppression of a latent print taken from a crime scene. It is no more useful to characterize the present case, as the government does, as one involving suppression of "Owens' ability to identify respondent as her assailant." Brief, at 11. *Davis*, in fact, involved suppression of an illegally obtained set of inked prints; this case involves suppression of the specific identification of the respondent which occurred at his trial.

Thus, respondent disputes the government's effort to read *Davis* as somehow sanctioning the in-court identification that took place in this case. It derives that reading principally from this Court's discussion, at 394 U.S. at 725 & n.4, of the D.C. Circuit case,
(continued)

In *Davis*, the defendant's prints, like respondent's photograph here, were obtained during an illegal investigative arrest. *Id.* at 726-28. Federal Bureau of Investigation fingerprint technicians determined that those prints matched the latent prints left on the window of a rape victim's home. *Id.* at 723. When this Court ordered the set of prints obtained from the defendant suppressed, it not only rendered any potential expert testimony useless, but it also stripped the latent prints themselves of their prosecutive utility, at least at a trial where the only set of the defendant's known prints which the state introduced were those that had been illegally seized. To be consistent, the government should view *Davis* as a case involving the "retroactive" suppression of this previously acquired

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Bynum v. United States, 262 F.2d 465 (D.C. Cir. 1958). The *Davis* court, as the government correctly observes, notes there that Bynum, whose first conviction was reversed because of the admission of illegally obtained fingerprints, was retried and convicted on evidence that included "another set of fingerprints in no way connected with his unlawful arrest. . . ." See Brief at 24, n.9. From this observation in *Davis*, the government argues that the in-court identification here should have been allowed. But the government simply ignores the crucial words in the passage that it cites—that the second fingerprints were "in no way connected" with the prior illegality. The implication of this discussion in *Davis* is thus that, had the second set of prints in fact been connected to the original illegal arrest, then the second conviction might have been infirm as well. Here, an unbroken and unattenuated causal chain linked respondent's illegal arrest with Owens' subsequent in-court identification. Indeed, the government has never suggested the existence of any untainted evidence. This is precisely why the Court of Appeals was correct in holding that that identification should have been suppressed.

tangible evidence.¹⁶

Thus, when the government contends that the Court of Appeals' ruling clashes with principles established in analogous cases from this Court, the conflict is imagined, not real. Whatever conflict might exist between this Court's prior holdings and the bogeyman of "retroactive taint" that the government has now created, in this case the Court of Appeals assiduously applied this Court's prior teachings to reach the correct result. Only from the perspective of the conceptual

¹⁶In fact, on the government's theory, *United States v. Ceccolini*, 435 U.S. 268 (1978), should have been resolved on the basis of "retroactive taint." In *Ceccolini*, a police officer while speaking socially with a shop cashier, casually examined an envelope belonging to the woman's employer. The envelope contained evidence of a gambling operation. Its discovery prompted the officer to question the woman about her knowledge of her employer's gambling activities. This Court held that the woman's subsequent testimony about those activities should not have been suppressed as the tainted fruit of an illegal search of the envelope. The Court acknowledged a causal connection between the search and the discovery of the woman's testimony, but it found that connection to be attenuated. Yet on the government's theory, *Ceccolini* should instead have been viewed as involving a "retroactive taint." For even before the search, the woman's identity was known to the police, and she was accessible; the search only caused the officers to realize her significance as a witness. But the Court did not decide the case on the grounds that the government urges here, namely that "taint" should never be imputed "retroactively." Instead, it applied normal attenuation analysis and found the causal link to be too weak. Moreover, this Court suggested that its analysis might well be different if the police illegality was motivated by the hope of discovering the identities of potential witnesses. 435 U.S. at 276, n.4. The Court of Appeals took precisely the same approach, in this case, and rightly concluded that here the evidence was not attenuated.

thicket where the government's search for "retroactive taint" has led it can it seem that the Court of Appeals has sanctioned immunity from prosecution in the guise of suppression of evidence, in conflict with *Frisbie v. Collins*, 342 U.S. 519 (1952), and *Ker v. Illinois*, 119 U.S. 436 (1886). See Brief at 20-22. As the government acknowledges, the Court of Appeals itself utterly disclaimed any such intention. Gov. App. 11a-16a. The government contends, however, that this disclaimer aside, the logic of its decision would inexorably lead to just that result; for, it says, here as in *Ker* and *Frisbie*, the only connection between an illegal arrest and the later use of previously acquired evidence is that the arrest "is what makes that evidence useful and leads to its presentation at trial." Brief at 22. Thus, according to the government, the logic of the Court of Appeals' decision would lead to the suppression of all the previously acquired evidence against a *Ker* or a *Collins*, and hence to the functional equivalent of immunity from further prosecution.

But as the respondent has already stated, this case does not involve the suppression of previously acquired evidence in any meaningful sense. The nexus here between the police misconduct and the challenged evidence is completely different and far more direct than the nexus in *Ker* and *Frisbie*. For here the police, when they arrested the respondent, had nothing approaching probable cause; only after the arrest, when they obtained the respondent's photograph, did they have the basis for a facially legal arrest. In *Ker* and *Frisbie*, the only challenge was to the mode of arrest, forcible abduction from a foreign jurisdiction—the pre-existing evidence already in police hands was not

merely sufficient to establish probable cause, but to establish guilt. What this distinction demonstrates is this: before the respondent here was arrested, the evidence he now challenges did not even exist. Only on account of that arrest did it come into being. This is the connection, missing in *Ker* and *Frisbie*, that led the Court of Appeals to conclude that the in-court identification here was indeed the fruit of the prior police misconduct.

Finally, the government points to *United States v. Wade*, 388 U.S. 218 (1967), and identification cases in that line. It does not attempt to revive the argument it made below, which was disposed of by the Court of Appeals, that the subjective "independent source" test fashioned in that case should be transplanted to Fourth Amendment soil,¹⁷ but it argues instead that the

¹⁷The respondent will not repeat all of the points that the court made in its analysis of the question. Gov. App. 20a-24a. But the *Wade* independent source test, which seeks to determine whether the in-court identification is reliable, makes sense where the primary objective is reliability in the individual case, not deterrence. As this Court taught in *Manson v. Brathwaite*, 432 U.S. 98 (1977), in the Fifth Amendment context deterrence must be sacrificed when the cost is the exclusion of reliable evidence. Even from the perspective of deterrence, it would be illogical, on Fifth Amendment grounds, to suppress a reliable in-court identification that preceded it. What that exclusionary rule seeks to prevent is not all police efforts to obtain identification evidence, but only such efforts that might yield unreliable identifications. To exclude a reliable in-court identification would, accordingly, inflict a penalty altogether out of proportion to the wrong committed.

In the Fourth Amendment context, deterrence is, of course, the "primary justification" for excluding evidence, *Stone v. Powell*, 428 U.S. 465, 486 (1976). Reliability is not merely secondary, but is altogether beside the point. *Davis v. Mississippi*, *supra*, 394 U.S.

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Court's decision in this case would have untoward implications for that other body of doctrine. If an unduly suggestive or uncounseled identification occurs before trial, the government argues, it may well influence the authorities to prosecute. This decision, in turn, would cause a defendant to be brought to trial, when, because of the existence of an independent source in the *Wade* sense, an in-court identification might take place. Yet, according to the government, the connection between the in-court identification and the prior illegality that occurred here is no more substantial than the analogous connection in such an example. Hence, the government says, suppression here would require suppression in such a situation as well, and thus would conflict with *Wade*. Brief at 26-27.

This argument is, evidently, a rebottling of the argument already discussed; it proceeds from the same misunderstanding of the connection that in fact exists between the respondent's illegal arrest and Owens' later in-court identification. That arrest did not merely bring

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at 724-24.

The government's effort in the Court of Appeals to offer one protection—the Fifth Amendment independent source test—as a substitute for Fourth Amendment protections developed with altogether different considerations in mind is like the unsuccessful effort of the state in *Brown v. Illinois*, 422 U.S. 590 (1975), to offer *Miranda* warnings as a substitute for Fourth Amendment protections. The effort was rebuffed, for "to admit petitioner's confession in such a case would allow 'law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the procedural safeguards of the Fifth.'" *Dunaway v. New York*, ___ U.S. ___, ___ (1979). Yet the government's argument from *Wade* would permit an analogous result here.

about, in the diffuse way¹⁸ that the government hypothesizes in its example, the occasion for previously acquired evidence to be used against him at trial. It was instead, the direct, unattenuated cause of that evidence coming into existence.¹⁹ Moreover there is no reason whatever to suppose that even if the Court of Appeals perceived this diffuse relationship, it would impose an exclusionary sanction. Indeed, it is clear that it would not; for in rejecting the government's argument that a Fifth Amendment independent source broke the causal chain here, the Court of Appeals discussed and relied upon the different objective of the two amendments. See n. 17, *supra*. In light of those objectives, an exclusionary sanction for reliable evidence because of suggestivity would be counterproductive, whatever the relationship of that suggestivity to the decision to prosecute.

Whether or not previously acquired evidence might ever be suppressed because of subsequent police misconduct, this case simply does not present that question.²⁰

¹⁸ Actually, it brought it about in no way at all. The finding of a Fifth Amendment independent source for the identification, implies that even absent the suggestiveness of the pre-trial procedures, the witness would have made the same identification. Hence we know, in retrospect, that the decision to prosecute was not influenced by the suggestive nature of those procedures.

¹⁹ Again, this is what distinguishes this case from *Ker* and *Frisbie*.

²⁰ Though an intriguing question it may be. Certainly cases might be imagined where retroactive suppression would make sense on deterrence grounds, as, for example, where the police make a dragnet arrest to find the person who fits the clothes found on the murder scene; or barge into every house in town to find the person who dropped the wallet at the scene of the government's

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It is neither necessary nor useful to strain, as does the government, to recast this case in the mold of "retroactive taint." It is unnecessary, because the decision of the Court of Appeals is perfectly intelligible when taken at face value, and the case analyzed as one involving the suppression of a piece of evidence, the in-court identification, that did not come into being until after the respondent's illegal arrest. And it is not useful to recast

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hypothetical burglary. (Brief at 37). The government's principal argument on this point appears to be that it will prove to be impossible to draw meaningful lines to separate those cases from others where suppression would be senseless. It asserts that if the door is opened to a single "retroactive taint" case, however sensible suppression might be in that case in terms of exclusionary rule policy, it will prove impossible to keep a parade of horrors from marching through afterwards. The reason, it says, is that attenuation analysis will prove an inadequate guard at the door. The government may be exaggerating the difficulty, however, if the illegality is egregious, but it only gave prosecutive utility to evidence lawfully acquired previously, it might be both reasonable, and appropriate, not to suppress that evidence, but to suppress the "utility" of it derived from the illegality. For example, the government might be permitted to introduce the legally seized clothing, but not to demonstrate in court that they fit the defendant. Moreover, it is difficult to see why the government thinks its hypothetical burglary case is so illuminating. If "suspects" were rounded up in dragnet fashion to find someone who matched the burglary, the case is, in truth, no different from *Davis*.

It might be appropriate to suppress the government's use of the photograph at trial as matching evidence unless it can show that the match was being made as a result of untainted evidence. This is analytically the same as what this Court did in *Davis*. It is certainly not at all self evident why attenuation analysis cannot be meaningfully applied to such cases.

the discussion that way, because if this case should be labeled as involving "retroactive taint," then so too should the vast majority of ordinary, unremarkable suppression cases.²¹

²¹It is interesting to speculate how it is that the government came to spin out this wondrous, but analytically useless concept of "retroactive taint." Perhaps it was developed as follows: After *United States v. Ceccolini*, 435 U.S. 268 (1978), it is no longer possible to make a head-on attack, and argue that the Court of Appeals was wrong simply because it suppressed testimonial evidence of a willing witness. Moreover, if the admissibility of testimonial fruits really is to be resolved by the application of conventional exclusionary rule principles, at this Court held in *Ceccolini*, it is difficult to find fault with the Court of Appeals' analysis. Hence, the flank attack. Somehow it must be shown that the evidence suppressed here is different in kind from that which was at issue in *Ceccolini*. Perhaps something can be made of the fact that here the police knew that the witness had potentially useful information before the misconduct occurred. Unfortunately, however, that would make no real difference because the in-court identification testimony which the Court of Appeals suppressed as a fruit obviously came after the misconduct. Calling that identification testimony an "ability" to give such testimony helps, because that ability did precede the misconduct. But, then, Mrs. Hennessey's "ability" to testify as she did in *Ceccolini* also pre-existed the police misconduct there, and the Court clearly did not decide the case on that ground. But if what is suppressed is called an "ability" to make an identification, and if an "inchoate ability" can be said to be "evidence" in the "possession" of the police prior to the misconduct, then this case can be distinguished from *Ceccolini*. Since this distinction has no functional meaning, it better have a sinister and beguiling name. *Voila*, "retroactive taint."

II.

THE SUPPRESSION OF OWENS' IN-COURT IDENTIFICATION IS NECESSARY TO DETER THE KIND OF BAD FAITH AND PURPOSEFUL POLICE MISCONDUCT THAT OCCURRED IN THIS CASE; MOREOVER THAT IDENTIFICATION WAS AN UNATTENUATED FRUIT OF THAT MISCONDUCT.

A. Deterrence.

In its discussion of the deterrent effects that suppression in this case would be likely to have, the government concedes that suppression of Carol Owens' in-court identification would yield "some incremental incentive" for the police to obey the Fourth Amendment. Brief at 31. But it then tries to minimize this increment by shifting attention from this case and focusing instead on "retroactive taint" cases as a class, contending that "there remain significant disincentives to unlawful arrests of suspects in the hopes of matching them to witnesses or other evidence already known." Brief at 31-36. This may be so where the "known" evidence points to a particular suspect, for then the police will not want to chance losing additional evidence against him by making an illegal arrest or illegal search. But this is surely not so where, as here, all the police "knew" was the name of a witness who might have an "inchoate ability" to identify an unknown suspect.

Indeed, this very case typifies a class in which there are not only no "significant disincentives to unlawful

arrest," but there are no disincentives at all.²² The question here, then, is not how far the courts should go in enforcing the exclusionary rule to create such disincentives, but whether they should, by opening their doors to allow the state the benefits of official lawlessness, create positive incentives for illegal searches and seizures; for unless the identification evidence challenged here is suppressed, the court's message to the police is that they have much to gain and nothing to lose by again stepping outside of the law and making bad faith, purposeful investigative arrests when faced with similar situations in the future. This is not a case where suppression of evidence results in a criminal going free because the constable blundered. No police mistake here will cost the government the benefit of some evidence that it would otherwise have obtained. If the police had not arrested the respondent illegally, as they did, there would have been no pre-trial or in-court identifications to suppress. If the police had respected the limits that the Fourth Amendment sets to their conduct, and refrained from making an investigative arrest of respondent, they would have been left empty-

²² Even if it were true that such disincentives existed, and they do not, this observation would not carry the government very far. For it could as well be made of any arbitrarily selected category of evidence such as, for example, firearms or statements: so long as only certain kinds of fruits are immune from suppression, the knowledge that other potential fruits are not, will provide an adequate deterrent to illegal police conduct. Since, as respondent has shown, no principled distinction can be drawn between the evidenced suppressed here, and that suppressed in a host of other fruits cases, to exempt it from the coverage of the exclusionary rule would be capricious. It would also be wrong as a matter of Fourth Amendment policy.

handed.²³

In other cases, the police may have a choice of two equally available routes, one legal and the other not, to the same evidence. They may decide to proceed with a warrantless search, when, in fact, a warrant should and could have been obtained. Suppressing but a part of their gains will then exact a meaningful penalty. Their choice of the expedient course of conduct will have cost them evidence that they would otherwise have acquired, a fact that may argue for restraint in the application of the exclusionary sanction.²⁴ But here, if the police are not deprived of the benefit of all of the fruits of their lawlessness, they and other officers confronting similar circumstances will have substantial reason to act lawlessly again when no legal means to pursue their investigation seem open.

²³ This is evident from the facts. It is also implicit in the finding of the Court of Appeals that the government had failed to demonstrate that the respondent's photograph would have been "inevitably discovered" by lawful means. Gov. App. 35a. And it is well to remember that had there been no illegal arrest, and had this case not arisen, then the constraints of the Fourth Amendment itself and not of the exclusionary rule would be responsible. Thus, the respondent here seeks no windfall. The Court of Appeals' decision puts the respondent no better off than if his constitutional rights had been properly respected in the first place.

²⁴ This is not to say that the exclusionary rule is not appropriately applied where the police do have equally available routes to pursue their investigation. It is where the police have lawful alternatives available to them that the *threat* of the exclusionary rule can be expected to work most effectively to channel their actions toward those alternatives. Thus the rule should "work", and therefore have to be applied infrequently. But it may also "work" if applied less rigorously. This is not so here.

Furthermore, the conduct here was purposeful in the most important sense of the word. The challenged evidence which the police obtained is precisely the evidence they were after when they decided to make an illegal arrest. As the Court of Appeals noted, "Crews was intentionally subjected to an investigatory arrest for the very purpose of obtaining identification evidence." Gov. App. 48a. This is, therefore, the sort of case where the suppression remedy, if it reaches to the in-court identification as well as to the other fruits of the illegal arrest, can be expected to be most efficacious—but only if it reaches that far. "The prohibition of the exclusionary rule must reach such derivative use if it is to fulfill its function of deterring police misconduct." *United States v. Calandra*, 414 U.S. 338, 354 (1974). Thus, the government has it backwards. It is the *incremental* incentive that is large. The incentive for the police to obey the law, when to disobey will still yield substantial net profit, is relatively small. What Judge Friendly said in *United States v. Edmons*, 432 F.2d 577, 584 (2d Cir. 1970), could as well be said here:

[I]n a case like this, where flagrantly illegal arrests were made for the precise purpose of securing identifications that would not otherwise be obtained, nothing less than barring any use of them can adequately serve the deterrent purpose of the exclusionary rule.

Yet to support its view that but scant deterrent value will be gained if the in-court identification is suppressed, the government does little more than attempt to point to alternative disincentives that, it says, might deter such investigative arrests in the future. These

alternative disincentives are not only inadequate in this case, but are so vaporous as to barely exist.

The "significant alternative disincentive" to unlawful arrests, the government maintains, is, primarily, the potential exclusion of "traditional" fruits, to wit, statements, tangible evidence, and pretrial identifications "*produced* by the arrest." Brief at 32 (emphasis supplied). To begin with, it is absurd to suggest that in a case such as this, the potential suppression of non-identification evidence could provide any significant deterrence at all. It is as though the state in *Dunaway v. New York*, ____ U.S. ____ (1979), had argued that even though the police unlawfully arrested the suspect precisely in order to question him, the statements they elicited need not be suppressed, because the "threat" that tangible evidence of the crime serendipitously found on his person would have been excluded provided a "significant disincentive" to the misconduct. Moreover, where, as here, such unsought fruits as statements or tangible evidence could not even conceivably have been obtained by the police absent the illegal arrest of the respondent, this argument is even more ridiculous, for the threat of "losing" what would otherwise not be found, is, of course, no disincentive at all. Even potentially suppressible evidence is better than no evidence at all.

The government also suggests that a significant disincentive is provided by the potential suppression—realized at the trial here—of evidence of pre-trial identifications. As with the suppressibility of unsought fruits, however, this is a non-existent disincentive; if the police had not made the investigative arrest, there would have been no pre-trial identification, suppressible or otherwise.

Moreover, even the suppression of all pre-trial identifications is of little, if any, benefit to the criminal defendant who is identified in court. Concomitantly, the potential exclusion of such identifications does not provide a disincentive to the police who contemplate making an investigative arrest with the hope of obtaining a conviction based on identification evidence. The impact of an in-court identification on a jury is far greater than the government seems to imagine. This case itself well illustrates the point: the respondent was convicted on the basis of such evidence alone.²⁵ From the standpoint of the prosecution, the out-of-court identifications may well be redundant, once the courtroom identification is allowed. Indeed, the Court recognized this fact, in *United States v. Wade*, 388 U.S. 218, 240 (1967), when it noted that it is often the defense that must itself bring out evidence of pre-trial identifications, as the only available means to attack or

²⁵The government suggests that respondent's acquittal on the January 6 robbery shows that there are disincentives when the government cannot introduce out-of-court identifications to bolster in-court identifications. However, in that case, contrary to the government's assertion, only one—not both—of the January 6 victims made pre-trial identifications of respondent, and there were discrepancies in the descriptions the witnesses to that robbery had given. Moreover, the respondent testified to an alibi for the January 6 robbery, and his testimony was corroborated by another defense witness. This evidence, not the government's inability to bolster its in-court identification, doubtless accounts for the jury verdict. After all, that same jury convicted him of the January 3 robbery on the basis of a single, uncorroborated, in-court identification.

impeach a positive in-court identification.²⁶

Moreover, on the government's theory that suppression of the in-court identifications is in reality the imputation of "taint, retroactively," to evidence that the police had acquired before their misconduct, respondent can find no way to distinguish between Owens' pre-trial lineup identification of respondent and her subsequent in-court identification of him. And the government never suggests a distinction. Indeed, it never addresses itself at all to the lineup identification, but rather, contrasts only the photographic identification which the government concedes is a traditional fruit, with the in-court identification which, it contends, is not.²⁷ If it is the government's unstated position that

²⁶Furthermore, although the government does not address this point, the respondent would venture to say that in a case where only the out-of-court identifications were excluded, the government might well argue that a vigorous defense effort to discredit the in-court identification would open the door to the introduction of evidence of nonsuggestive pre-trial identifications, even if the defense had not alluded to them, under a principle of curative admissibility, analogous to the doctrine of *Walder v. United States*, 347 U.S. 62 (1954). Any deterrence would then be lost altogether. The fruits of the police misconduct would thus remain suppressed only so long as the defense mounted no challenge to the identification evidence that was admitted.

²⁷It is respondent's positions, of course, that the in-court identification is as much a suppressible fruit of the illegal arrest as the photographic identification. The government, it seems would distinguish the photographic identification on the illogical basis that the photograph of the respondent which was actually displayed to the victim was secured during an illegal detention. But, clearly, on the government's theory of "retroactive taint" evidence of the photographic identification should not be suppressible either; for Owens' "ability to identify" the

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the testimony of the lineup identification is admissible then its suggestion that the potential exclusion of pre-trial identifications provides a substantial disincentive in cases such as this, is disingenuous, for surely the suppression of the photograph identification alone would in no way diminish the strength of the government's case at trial.²⁸ On the other hand, if it is the government's position that the lineup identification was properly suppressed, this cannot be squared with its general theory of "retroactive taint."

As we have seen, then, the "alternative disincentives" hypothesized by the government as adequate to deter the police prove to be illusory in cases such as this where the officer acted in bad faith and his very purpose in making the illegal investigatory arrest is the hope of securing identification evidence, and where there is no equally available way for them legally to

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photographic image pre-existed the respondent's arrest in the same sense that her "ability to identify" his corporeal being did. And the film used to take the respondent's picture surely had the "ability" to reproduce his likeness before he was arrested. Hence the photographic identification, too, could be suppressed only as "retroactively tainted". Whatever sophisticated distinctions the government can draw with respect to that identification, the lineup identification, like the in-court identification, was secured only after the respondent's re-arrest. Consequently the lineup identification cannot be distinguished from the courtroom identification on any basis at all. This may be why the government ignores the point.

²⁸In *Gilbert v. California*, 388 U.S. 263 (1967), which the government cites as recognizing the significance of evidence of pre-trial identifications to the government's case, this Court referred only to lineups as "enhancing the impact" of the in-court identification. Moreover, in doing so, it in no way disparaged the impact of the in-court identification itself.

accomplish this purpose.²⁹ Because in such a case the in-court testimony falls squarely within the "offending officer's zone of primary interest,"³⁰ its exclusion—and only its exclusion—will significantly deter such police misconduct by eliminating the incentive to act lawlessly.³¹

²⁹At one point in its brief, the government argues that because the police officers here "believed their actions to be lawful" the knowledge that in-court identifications could be suppressed "would not have effected their conduct." Brief at 33. The argument's premise is clearly erroneous; both courts below found that the police knew they lacked probable cause when they arrested respondent and thus were acting in bad faith. Even if this premise were true, it would be irrelevant in those Fourth Amendment contexts where the application of the exclusionary rule turns on an objective, not a subjective, standard. See, e.g., *Scott v. United States*, 436 U.S. 128, 135-127 (1978). This is as it should be, for even if officers acting in good faith cannot be deterred by the exclusionary rule, its application can be expected to induce police departments generally to try to inculcate their members with an understanding of constitutional constraints. See *Stone v. Powell*, 428 U.S. 465, 492 (1976). In this particular case, involving a portion of a witness' testimony as a putative derivative fruit, the good or bad faith of the police officers is a factor that should bear heavily on attenuation analysis. See *United States v. Ceccolini* 435 U.S. 268 (1978). The Court of Appeals' opinion quite properly factored in the officer's bad faith and found that it tipped the balance in favor of exclusion.

³⁰*United States v. Janis*, 428 U.S. 433, 458 (1976). See also *United States v. Ceccolini*, 435 U.S. 268, n.4 (1978).

³¹As the Court of Appeals put it:

We reject the notion that mere suppression of the photographic and line-up identification testimony would somehow be an adequate deterrent sanction in this case. This conclusion could only result from the untenable assumption that a sufficient disincentive results when the police are prohibited from enjoying some, but not all, of the products of their wrong. Gov. App. 52a.

B. Attenuation.

It is not until page 45 of its brief that the government stops flailing away at the "retroactive taint" theory of which the Court of Appeals decision is said to be an unwitting example, and confronts that decision on its own terms, arguing that even if "Owens' testimony can be considered a fruit" of respondent's illegal arrest, "established principles of attenuation (as best they can be applied),³² supports its admission." As the Court of Appeals correctly concluded, however, established principles of attenuation analysis show no such thing. Indeed, consideration of those principles highlights the propriety of suppressing Owens' in-court identification. It is precisely because the causal nexus between the police misconduct and the challenged fruit is so clear that the government is unable to establish attenuation.

In *Brown v. Illinois, supra*, this Court identified three factors which could usefully be considered in determining whether a statement of a suspect obtained by the police after his illegal arrest, is a suppressible fruit of that arrest. Those factors—temporal proximity, intervening event, and the character of the illegality—make eminent good sense in the context of *Brown*, where the issue was whether the suspect's statement was "sufficiently an act of free will to purge the primary taint

³²Even here, the government will not quite let go of its doctrinal crutch.

of the unlawful invasion."³³ If the statement follows close on the heels of the illegal arrest, then it is more likely to have been the product of it.³⁴ Conversely, there may be certain events which occur between the arrest and the statement—intervening circumstances—which make it more likely that the statement was not generated by the misconduct but, rather, was sufficiently a product of the suspect's free will. Finally, the nature of the police misconduct is relevant to the suppressibility of a statement in two ways. First, if the arrest is made in a particularly heavy-handed or brutal way, then a statement is more likely actually to have been induced by it, and it is more likely that such a statement is what the police were after. Second, if the illegal arrest is made purposefully and in bad faith,

³³The concepts of independent source and attenuation, in many cases, intersect and overlap. Indeed, they are frequently used interchangeably by courts. It seems, however, that independent source analysis is directed toward determining whether, in the words of *Wong Sun v. United States*, 341 U.S. 471 (1963), the challenged evidence was "come at by exploitation" of the Fourth Amendment violation. If it was not, then it is less likely that the misconduct was directed toward obtaining such evidence. Even more importantly, it is simply felt to be inappropriate to exclude evidence that was in fact produced by the illegal arrest in no more than a "but for" sense. Attenuation analysis, on the other hand, is directed toward determining whether the evidence obtained was an intended or foreseeable consequence of the police misconduct. If it was, then the deterrent purposes of the exclusionary rule will be furthered by its application. On the other hand, if the evidence was an unanticipated by-product of the illegality, then its suppression will probably have little deterrent effect on future police conduct.

³⁴Temporal proximity may sometimes also be relevant in determining the intent of the police when they committed the misconduct. Where the statement is obtained quickly, it is more likely that it was a foreseen and intended consequence of the misconduct.

then, it is the kind of misconduct that is more readily deterrable,³⁵ and no matter how decorously the arrest is made, it may nevertheless be appropriate to apply the exclusionary sanction.

Obviously, the three factors relevant in *Brown* may have greater or lesser significance in other settings, with other putative fruits, as *Ceccolini*, *supra*, shows. The issue in *Ceccolini* was whether the testimony of a witness, whose knowledge of criminal activities came to the attention of law enforcement authorities as a consequence of an illegal search, should be suppressed. Given the nature of the challenged fruit, the Court concluded that a fourth attenuation factor, the willingness of the witness to testify, was the most relevant indicator of attenuation:

The greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means. And, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness. . . . Witnesses can, and often do, come forward of their own volition.

Ceccolini, *supra*, 435 U.S. at 276.

But, of course, the factors identified in *Brown* and *Ceccolini* can not be mechanistically applied to other contexts. This is why the government's wooden attempt to apply them here founders. But its difficulty has nothing whatever to do with "retroactive taint." It

³⁵Even good faith but illegal arrests are sometimes deterrable. The exclusionary sanction may be usefully applied to such arrests to induce police departments to sensitize their members to Fourth Amendment concerns. See n.29, *supra*. Where the arrest is made in good faith, however, it may be appropriate to apply the sanction less rigorously.

arises because the misconduct here was a purposeful investigative arrest with a specific fruit in mind.

Temporal Proximity. Temporal proximity has no bearing here. This is not, however, because, as the government contends, "[temporal proximity] can have no meaningful role to play . . . [w]here evidence is not a product of the search, being already in the possession of the police." Brief at 48. Rather, temporal proximity has no "meaningful role" to play here because the investigative purpose of the police misconduct is crystal clear, and the respondent's photograph unquestionably flowed from it. Since there is no question but that the very purpose of the police was to use that photograph to obtain an in-court identification, that benefit was obviously foreseeable no matter how long it was in coming.

Intervening Events. Events occurring between the time of the police misconduct and the development of the challenged evidence may reveal that the evidence was not in fact generated by—"come at by exploitation" of—that misconduct. Where this is so, suppression is felt to be inappropriate. An "intervening event" may also be relevant to show that the evidence obtained was an unanticipated and unforeseeable consequence of the police misconduct. Suppression in those cases is likely to be an ineffective deterrent.

The government contends that "the absence of a meaningful cause-effect relationship here between the illegality and the subsequent discovery of evidence diminishes the utility of this factor in the attenuation analysis." Brief at 49. This is nonsense. There are no significant intervening circumstances here which would establish attenuation simply because the challenged

evidence, Owens' in-court identification, was unquestionably the intended consequence of the purposeful police misconduct. There might, however, have been an "intervening event" which constituted an independent source for the challenged evidence. If the government had shown that it was legally obtained, untainted, evidence which brought about the opportunity for an in-court identification, then that identification would have been permissible.³⁶ But the government has never even claimed that there is such evidence.³⁷

The government does suggest, however, that there was one significant intervening event—the trial court's finding of a Fifth Amendment independent source for the in-court identification—"not specifically addressed" by the Court of Appeals. The government contends that

³⁶The magistrate's lineup order and finding of probable cause based on legally obtained evidence established just such an independent source in *Johnson v. Louisiana*, 406 U.S. 356 (1972).

³⁷It is only the in-court identification by Owens at the respondent's trial that was held to be a suppressible fruit. It was not, as the government would have it, her ability to make an identification that was suppressed. Nor, of course, was Owens herself suppressed as a witness. No evidence is permanently tainted. If at any time, before or after the respondent's trial, the government could show that it had sufficient untainted evidence to bring the respondent to trial, then an identification could have been made. If, as a practical matter, such an independent source is not likely to be found in a case like this, then the resulting social cost is no greater than the often invisible cost society pays when the police, as they should, obey the Fourth Amendment. The inability of the police to find an independent source means only that, had the police not flouted the limits that the Fourth Amendment sets on their conduct, they would never have acquired any evidence against the respondent, and, indeed, there would never have been any trial.

this "event" supports a finding of attenuation in the present case because when the police officers arrested the respondent they could "have no assurance" that such a finding would be made by the trial court. Brief at 49.

It is not surprising that this "intervening event" was not addressed by the Court of Appeals, for it was not alleged to be one. At all events, the government's argument here is but a feeble appendage to its argument from alternative disincentives, cloaked in attenuation verbiage. It amounts to this: because the police could not be certain that they would succeed in acquiring the evidence they sought to obtain through their investigative arrest, the evidence that they do obtain where they succeed, thereby tends to be attenuated. The government might as well have said that the fact that the police "had no assurance" that Owens would be able to identify respondent's picture tends to "attenuate" any identification that she does make.

Moreover, the trial court's determination that the witness had an independent source for her in-court identification, properly analyzed, is not an intervening event at all. The witness' opportunity to observe, which is the practical cornerstone to a finding of "independent source," either existed, or did not exist, *prior* to the illegality. The trial court's finding of "independent source," in other words, was merely a judicial interpretation of facts that existed days before the illegality itself. Indeed, it is doubtless precisely because the police thought, from the witness' own account of the robbery, that she might be able to identify her assailant, that they believed that an investigative arrest to obtain photographs would prove

useful.³⁸ This illegality, in other words, not only presupposed, but was motivated by, the officer's hope that the witness could make an identification. It is absurd to suggest that the same factor that motivated the illegality in the first place, the witness' opportunity to observe, also constituted an "intervening event" to break the causal chain between the illegality and the fruit.

Moreover, even if the focus is on the trial court's ruling rather than its factual foundation, the ruling is still not an unanticipated event.³⁹ In virtually every case where the police make an illegal arrest it is conceivable that a trial court may find the fruits of that arrest irrelevant, or too prejudicial, and thus inadmissible at trial. To say, however, that a trial court's finding of legal relevance of illegally seized evidence is a significant attenuating event because the police could not be sure such a finding would be made, is casuistry.⁴⁰

³⁸To be sure, the government does not assert that this one factor alone should lead to a finding of attenuation. To the extent that it relies on this factor, it is, however, advocating an open invitation to police to conduct arrests to obtain identifications wholly without regard to the existence of probable cause, just as the state advocated with respect to illegal arrests for interrogations in *Brown v. Illinois*, *supra*. See Brief at 53, n.30.

³⁹In the District of Columbia, at least, there are no reported cases where either trial courts or appellate courts have found that an in-court identification proffered by the government lacked an "independent source."

⁴⁰Indeed, as the respondent had mentioned in Part I of this brief, p. 25, n.17; *supra*, this argument is but a relabeling of the argument that was made and convincingly refuted in the Court below that the *Wade* independent source test can somehow substitute for Fourth Amendment protections that have been fashioned with altogether different considerations in mind.

Free Will of the Witness. The government avers that "the Court of Appeals did not examine this consideration, although *Ceccolini* dictates that it be considered." Brief at 49. The government then goes on to beat the same old drum: because this case involves a "retroactive taint," "it is more difficult to know how to weigh the factor of free will in the analysis." Brief at 50, n.27.

The Court of Appeals did "examine this consideration" at some length, however, and explained why, in a case such as this, the free will of the witness is simply irrelevant. Its discussion has nothing whatever to do with "retroactive taint":

More particularly, as to this last, "free will" variable, we note that in *Ceccolini* the witness was discovered as a result of the illegal search. Suppression of her testimony, however, would not have served the deterrent purpose of the exclusionary rule, for the policeman at the flower shop could not have perceived the eventual reward of that witness' testimony from his unlawful look inside the envelope. As the Court indicated in *Brown v. Illinois*, *supra* at 610, the rationale for recognizing a witness' free will as a significant attenuating variable is that "the police normally will not make an illegal arrest [or search] in the hope of eventually obtaining such a truly volunteered statement."

In *Ceccolini*, however, the Court "reject[ed] the Government's suggestion that we adopt what would in practice amount to a per se rule that the testimony of a live witness should not be excluded from trial. . . ." *Id.* at 1059. The present case is a clear example of why such a per se rule would compromise the Fourth Amendment. Here, the witness could never have volunteered an identification of Keith Crews of her own free will, absent

the unlawful arrest and photograph. Her in-court identification was premised on this critical link to Mr. Crews illegally acquired by the police. Thus, in the present case, the significant result of the unlawful police activity was not discovery of the witness (who was already known and ready to testify); it was the tangible evidence that made her initial identification, as well as her eventual in-court identification, possible. The police had every reason to anticipate that if they could obtain a photograph of the assailant, by any means, identification by a ready witness would quickly follow. Accordingly, the free will of the witness in the present case does not represent an attenuating, intervening force. To the contrary, unless the exclusionary rule is applied in this case, an important deterrent would be relaxed; an incentive would be created for illegal arrests and searches in the hope of finding tangible evidence to facilitate identifications by known witnesses. Gov. App. 51a-52a, n.37.

Surely the government is not suggesting that *Ceccolini* dictates that the free will of the witness be taken into account even where it is manifestly irrelevant. This is not to say, however, that courts should not be sensitive to the costs of excluding testimonial evidence when they determine the issue of attenuation.

The Character of the Fourth Amendment Violation. As the Court of Appeals recognized, this Court has identified the nature of the illegality as the most important single factor in attenuation analysis. This is because, as the government itself acknowledges, this factor is most pertinent to the primary objective of the exclusionary rule—the deterrence of future police mis-

conduct.⁴¹ This factor can itself be divided into at least three aspects, and the government's discussion is flawed by its failure to distinguish between them. First, the misconduct may be "flagrant" in the sense that it is carried out in a brutal, or unnecessarily heavy-handed way; or it may be "flagrant" in the related, but distinct, sense that it is clearly unlawful, *e.g.*, an arrest based on evidence that does not even approach probable cause. Second, the misconduct may be "willful" or in "bad faith," in that the officers knew that what they did was unlawful. And third, it may be

⁴¹The government begins its discussion of this factor with an observation that betrays a fundamental misunderstanding of legal causation:

The attenuation factor that is least distorted by the absence of a conventional cause-effect relationship between the police misconduct and the challenged evidence concerns the character of the violation, in terms of its purpose and its flagrancy. In large [sic] part that is because this factor is pertinent not so much to the effort to identify the strength of the nexus between the violation and the evidence as to more general considerations of exclusionary rule policy.

Brief at 50.

This suggests that "the strength" of a causal "nexus" has some abstract meaning and that these other factors of analysis enable us to determine this "real" strength. But we do not decide whether there is a "strong causal nexus" just by looking very hard at the facts. Once there is a "but for" connection, the question whether legal consequences should attach to it, *i.e.*, in this context, whether it is attenuated, can only be answered from some perspective. We "ascribe" cause if we think that doing so will advance our objective—here, deterrence—at a reasonable cost. All the factors of attenuation analysis are intended to help us answer this same question. The fact that they may not be relevant in some contexts does not indicate that there is no "real" causal connection, but only that in those contexts they have nothing to do with deterrence.

“purposeful” in that the challenged evidence is what the police were after when they violated the Fourth Amendment.⁴²

In its brief, the government’s argument takes this form: First, the misconduct here was not terribly serious:

In short, the reasons for the detention were substantial, the intrusion on respondent’s constitutionally protected interests was relatively limited; and nothing in the circumstances of the case supports an inference that the officers were acting in willful disregard of what they understood to be their lawful authority. Brief at 52 (footnote omitted).

Second, “the court of appeals did not disagree with” this characterization of “the circumstances of the detention,” therefore it suppressed the in-court identification solely because it concluded that the arrest was made for the purpose of obtaining the challenged evidence. This was wrong, the government concludes, because “most Fourth Amendment violations are prompted by investigative purpose” and so “a consideration solely of purpose will have the effect of eliminating the attenuation analysis in almost all cases.” Brief at 53.

In each of its premises the government is mistaken. To begin with, the Court of Appeals found that the “reasons for the detention” were not substantial—indeed, the Court found that the arrest was flagrant. The information known to the police when they arrested the respondent—that he bore a “minimal

⁴²The relevance of these considerations is likely to depend, in part, on the nature of the challenged fruit.

resemblance” to a very “general description” and “might” have been in the area of the Washington Monument at some time on the day of a robbery six days before—was woefully short of probable cause. And the “intrusion on respondent’s constitutionally protected interests” was not insubstantial. He was transported to police headquarters, and searched, photographed and fingerprinted. In all, he was forcibly detained for well over an hour. Finally, and most importantly, while the government may find “nothing in the case to support an inference” that the police acted in bad faith,⁴³ the Court of Appeals clearly did, and drew just such an inference:⁴⁴

⁴³There is a certain irony to the government’s suggestion that if the arresting officers had read “some of the recent decisions of the District of Columbia Court of Appeals,” they would have been “doubly surprised” that their conduct “violated the Fourth Amendment.” (Brief at 50-51, n.28) Not one judge of that same Court, sitting *en banc*, read those decisions as justifying the police officers’ conduct. Even for the dissenters, there was “no question but that” the officers acted unlawfully. Gov. App. 58a.

⁴⁴The government argues that the officer’s belief that the respondent may have been a truant somehow supports the reasonableness of the investigative arrest. Brief at 52, n.29. But, of course, their attempt to cloak the real purpose of that arrest with talk of truancy cuts just the other way, for it shows that the police realized that they did not have probable cause to arrest for robbery. The Court of Appeals did not treat this as a sham or pretext arrest case because, it concluded, the police went ahead and actually arrested for robbery anyway even though they knew that they did not have probable cause to do so. It did factor the sham aspects of the arrest into its determination that there was bad faith, however. Gov. App. 44a-45a, n.32. Indeed, it is the “bad faith” quality of this arrest that separates it from the run-of-the-mill arrest without probable cause.

The remarkable parallels to the offending police activity in *Brown v. Illinois, supra*, are noteworthy. In that case, as in this,

[t]he impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their actions was "for investigation: . . . The detectives embarked upon this expedition for evidence in the hope that something might turn up. [Id. at 605 (footnote omitted).]

Thus the government is wrong when it says that the Court of Appeals agreed with its characterization of the facts and ordered suppression only because the arrest was purposeful. On the contrary, the Court clearly found that the arrest was made in bad faith; that is, that it was an investigative arrest, in the sense that the police fully realized they did not have sufficient evidence for an arrest, but made it anyway, in the hope of developing such evidence.

The government suggests that because virtually all police misconduct is directed toward some investigative end, it is not useful to consider "purposefulness" in attenuation analysis. This, too, betrays a misunderstanding of the Court of Appeals' opinion. Obviously, "purposeful" misconduct is not being used by the Court of Appeals to denote all misconduct undertaken for some purpose or other. Rather, it is referring to misconduct specifically directed toward obtaining the evidence challenged as its fruit. As the Court of Appeals said in summarizing the nature of the illegality which it found to have occurred here:

The scenario which emerges from this testimony is unambiguous: [respondent] Crews was in-

tionally subjected to an investigative arrest for the very purpose of obtaining identification evidence. (Gov. App. 48a.)

It is clear, then, that there are many cases where application of the exclusionary rule may be inappropriate or ineffective simply because the challenged evidence was discovered unexpectedly, as for example, where evidence is uncovered with respect to one offense, upon an arrest for another or, simply, was not the evidence the police were specifically after when they made the unlawful arrest.⁴⁵ And it may also be inappropriate to apply the exclusionary rule as vigorously where the police believe in "good faith" that they have probable cause. But, conversely, where, as here, the challenged evidence is precisely the evidence which the police were after when they calculated that it would be worth their while to act unlawfully in order to obtain it, both purposefulness and bad faith exist, and it will be difficult for the government to show attenuation. This, of course, is how it should be, for it is precisely here that the exclusionary rule is both most efficacious and most necessary.

⁴⁵The Court of Appeals distinguished its prior decision in *Bond v. United States*, 310 A.2d 221 (1973), and two United States Court of Appeals' decision, *Payne v. United States*, 294 F.2d 723 (D.C. Cir. 1961), and *United States v. Reid*, 527 F.2d 380 (2d Cir. 1975), on just that basis. Gov. App. 53a, n.38.

III.

**THIS COURT SHOULD NOT CARVE OUT
AN EXCEPTION TO THE COVERAGE OF
THE FOURTH AMENDMENT EXCLU-
SIONARY RULE FOR THE TESTIMONY
OF THE VICTIM OF A CRIME.**

In part three of its brief, the government asks this Court to rule that the reliable testimony of the victim of a crime should be exempt from the coverage of the exclusionary rule no matter how egregious the police misconduct that produced it. In other words, it asks this Court to announce that even where the police make wide ranging, dragnet arrests, or conduct broad, general searches, they will be permitted to reap the fruits, so long as those fruits can be translated into the form of victim testimony.⁴⁶ Since in many cases the ultimate and foreseeable benefit to the police of such misconduct, is, of course, just such testimony, the message to the police contemplating such sweeping arrests or general searches would be clear indeed.

This Court has never conveyed such a message

⁴⁶The government proposes that the exception should be for the testimony of victims that is "reliable and independently based." Brief at 56. But it never explains what this means, and "independently based" is hardly self explanatory. In this very case, the Court of Appeals found that Owens' in-court identification was not "independently based." Indeed, this was, of course, its reason for excluding it. If the government is suggesting a Fifth Amendment test of "independent basis," then under such a test the victim would be permitted to identify and testify about illegally seized tangible evidence such as weapons or stolen property. If the government does mean to undo in this way what has heretofore been unquestioned Fourth Amendment doctrine, it should say so directly.

before. Where it has declined to extend the suppression sanction, as, for example, to the use of illegally seized evidence in grand jury proceedings, *United States v. Calandra*, 414 U.S. 338 (1974), in civil cases, *United States v. Janis*, 428 U.S. 714 (1974), or for impeachment, *Oregon v. Hass*, 420 U.S. 714 (1975), it has done so in the confidence that the threat of suppression of the evidence's direct use in the criminal trial itself provided a sufficient deterrent to police misconduct. It has, wisely, never carved out an exception⁴⁷ to the exclusionary rule based on the kind of evidence illegally obtained.

The government argues that the Court should do so now because the "cost to society and the adverse impact on the administration of justice are too high to warrant the deterrent benefits, if any, of suppression of this kind of evidence." Brief at 56. But the "deterrent benefits" of exclusion are far from speculative. As the arrest here, and as the dragnet arrests in *Edmons, supra*, show, the police do commit bad faith, and flagrantly unlawful arrests with the goal of securing in-court identification at trial. Moreover, as respondent has shown, unless the in-court identification testimony is suppressed, the real incentive for such police misconduct remains.

Nor are the costs to society of excluding that portion of a victim's testimony which is directly produced by egregious official misconduct so great that it should be

⁴⁷Not surprisingly, the government prefers "recognize" to "carve out"; but it neither cites any decisions of this Court that support its position, nor suggests any principles under which a victim's testimony is conceptually different from any other testimonial fruit.

admissible under a *per se* rule. Rather, the principles of attenuation analysis which this Court has carefully developed in such cases, as *Brown, supra*, and *Ceccolini, supra*, should be applied on a case by case basis with respect to a victim's testimony as well; for there is simply no principled basis on which to distinguish the testimony of an eyewitness from that of a victim.⁴⁸ Deterrence considerations are, surely, the same, and so are the social "costs" of suppression, for the exclusion of any evidence, testimonial or tangible, may make it impossible for the state to secure a conviction.

At the same time, however, it is certainly true that the exclusion sanction should be applied to a victim's testimony only where its propriety, and its likely deterrent effect, are clear. As this Court cautioned in *Ceccolini*, "since the cost of excluding live witness testimony often will be greater, a closer, more direct link between the illegality and that kind of testimony is required." 435 U.S. at 278. This may be especially true where it is a portion of the victim's testimony that is at issue. Where, as here, however, a court finds that the

⁴⁸ Having failed in *Ceccolini, supra*, to persuade this Court to adopt a broad, *per se* rule of admissibility for all testimonial evidence, the government now asks this Court to adopt a more limited version of such a rule which would not even have the virtue of establishing a bright line. For what, precisely, is a "victim"? Suppose the government charges a crime against several persons, some of whom prove at trial only to have been eyewitnesses; is their testimony suppressible as a fruit of police misconduct? If it is not, there will be an invitation to overcharge. If it is, the mechanics of suppression are at best unwieldy; for it may not be until the jury verdict that the putative "victim" is found not to have been one after all. Moreover, there are many crimes whose victims are hard to identify; and ironically, for the most serious crime of all—murder—there is, of course, no victim to testify.

link is both close and direct because it finds that there was a flagrant and bad faith arrest intended to develop the very identification testimony challenged as its fruit, the suppression sanction should be available to it. While the application of the exclusionary rule does, of course, always involve a social cost, this is really a cost our society has chosen to bear in the interest of protecting those rights secured by the Fourth Amendment itself. There would be a far more perilous price to pay if this Court were to declare "...that the government may commit crime in order to secure the conviction of a criminal."⁴⁹ This Court has never done so before, and it should not do so now.

⁴⁹ *Olmstead v. United States*, 277 U.S. 438, 485 (1928), Brandeis, J. dissenting.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectively submitted,

/s/ SILAS J. WASSERSTROM

SILAS J. WASSERSTROM

Chief, Appellate Division

/s/ W. GARY KOHLMAN

W. GARY KOHLMAN

/s/ WILLIAM J. MERTENS

WILLIAM J. MERTENS

Counsel for Respondent Crews

Public Defender Service

451 Indiana Avenue, N.W.

Washington, D.C. 20001

(202) 628-1200

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In the Supreme Court of the United States

OCTOBER TERM, 1979

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UNITED STATES OF AMERICA, PETITIONER

v.

KEITH CREWS

*ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS*

REPLY BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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*ON WRIT OF CERTIORARI TO THE
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REPLY BRIEF FOR THE UNITED STATES

1. In this case the court of appeals ordered the suppression of the in-court identification testimony of the victim of a robbery on the ground that that testimony was the tainted fruit of an unlawful arrest of respondent, which produced a photograph that enabled the victim to identify respondent to the police as her assailant. The lead argument in our opening brief was that the court erred in concluding that the in-court testimony was a "fruit" of the unlawful detention for exclusionary rule purposes (Br. 16-45). We argued that evidence should not be held to be a fruit where, as here, the only nexus between what is presented in court and the unlawful conduct concerns the manner in which information lawfully acquired by the police becomes linked to the particular defendant. The court of appeals' contrary conclusion, we contended, amounts in effect to a holding that evidence lawfully acquired may be retroactively tainted by some subsequent misconduct.

Respondent's principal contention is that we have mischaracterized the court of appeals' rationale and the nature of the evidence suppressed in this case, and that there is no principled distinction between the evidence suppressed in this case and many (if not all) other kinds of fruits of police misconduct that have traditionally been recognized as subject to suppression. That contention is incorrect. Notwithstanding respondent's *ad hominem* characterizations of our argument, nothing in his brief refutes our contention that the evidence suppressed in this case and its nexus to the unlawful conduct are significantly different from the kinds of evidentiary fruits that this Court has heretofore held to be subject to suppression.

We acknowledge that it is somewhat difficult to characterize in-court identification testimony in the same terms commonly used to describe tangible evidence, or even other kinds of verbal evidence, like confessions or other statements. When the police find a fingerprint or the murder weapon at the scene of a crime, we refer to the "evidence" as the fingerprint and the weapon themselves, and not their presentation in the courtroom. When the police find an eyewitness who gives them a description of the criminal based on an ample opportunity to observe him, the witness's inchoate ability to identify the culprit is not normally referred to as the "evidence" in question; but analytically that ability is no different from fingerprints, or murder weapons, or any other kinds of tangible evidence that might ultimately serve to link an as yet unknown culprit to the crime. On the assumption that the witness's ultimate identification of the defendant is based on his or her independent recollection of the crime—an

assumption not disputed by the court of appeals or respondent in this case—the witness's ability to identify the defendant is like a photograph that the police find at the scene of the crime and that will acquire prosecutive utility only when the police find the person whom it matches.¹

In this case the police lawfully "obtained" that mental photograph before respondent was detained; the consequence of the detention was to match the photograph to respondent and thus enable it to be used in his prosecution. For the reasons stated at length in our opening brief, we believe that that kind of nexus is not sufficient to warrant the suppression of lawfully acquired evidence. But whether or not the Court agrees with us in this, we think it clear that the nexus between the suppressed evidence and the police misconduct in this case is very different from the nexus existing in all other exclusionary rule cases decided by this Court, and nothing in respondent's brief undermines that conclusion. In all other "fruits" cases, the police misconduct has disclosed to the police some quantum of relevant information over and above the mere fact that evidence already known to

¹The fact that the police cannot themselves see the "photograph" in the witness's mind is immaterial; it means only that they need the agency of the witness in order to match the "photograph" to a real person, much as they may need the agency of an expert in order to match a fingerprint or handwriting exemplar found at the scene to a real person.

them or in their possession matches the defendant. In the ordinary case, for example, the challenged search disclosed the fact that the defendant has relevant evidence on his person, his automobile, or his premises. In *United States v. Ceccolini*, 435 U.S. 268 (1978), the unlawful search disclosed the previously unknown fact that a witness possessed relevant information. In the instant case, the only thing the unlawful detention disclosed was the identity of the defendant and the congruence between his physiognomy and the recollection of a known witness.

Respondent is therefore incorrect in contending (Br. 22-23) that our position would require the admission of many, if not all, kinds of evidentiary fruits traditionally subject to suppression, such as stolen property that is found on an unlawfully arrested defendant and that belongs to a known crime victim. In that example, the arrest discloses the fact that the stolen property was found on the person of the defendant; it is this relevant fact that is the fruit of the search in the traditional and established sense, and under our position such evidence would have to be suppressed.² Under the logic of respondent's

²Of course the witness would under our analysis be able to testify in court to identify the property as his, but that testimony would have little prosecutive value in the absence of testimony establishing where the property was found.

Respondent's other examples of the kind of evidence that he contends would be admissible under our position (Br. 22-23) are also incorrect. If stolen property were found on an illegally arrested defendant and the defendant's fingerprints were found on that property, the testimony of an expert that the prints found on the property matched the defendant's prints would not be admissible under our argument (absent other attenuating circumstances or independent sources). In that example, the unlawful search disclosed the fact that the defendant's fingerprints were on the stolen property, and that fact, under established principles, would be a tainted fruit of

position, however, courts in that example would be required to suppress not only the fact of finding the stolen property on the defendant but also the reliable in-court testimony of the robbery victim that she saw the defendant rob her, if the discovery of the stolen property is what led the police to identify the defendant as the culprit and thus provided the cause for his indictment and prosecution. For the reasons fully set forth in our opening brief, such a view of suppressible fruits has never been endorsed by this Court, would have far reaching and undesirable consequences, and should be rejected.

2. In support of our position, we argued in our opening brief (Br. 29-45) that the court of appeals' theory of tainted fruits would provide limited incremental deterrent

the search. The same would be true of the vacuum sweepings found in the defendant's car during an unlawful search in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

The same analysis applies to Owens' pre-trial identification of the photograph taken of respondent during his unlawful detention, which respondent incorrectly argues (Br. 40-41 and n.27) is indistinguishable from Owens' in-court testimony. With respect to that evidence, the detention disclosed a fact of probative value over and above the fact that the defendant matched the witness's independent recollection of the crime—namely, the fact that the witness identified the defendant's photograph shortly after the crime occurred, when, the jury might conclude, her recollection was fresh.

Whether the trial court correctly suppressed the pre-trial lineup identification as well as the pre-trial photographic identification is, we admit, a more difficult question which is not presented for decision in this case. Arguably the line-up identification is analytically the same as the photographic identification: *i.e.*, the arrest disclosed the fact that a witness selected the defendant from a line-up, and that fact has probative value different from and in addition to the fact that the defendant seated in the courtroom matches the witness's recollection of the criminal. On the other hand, if the line-up is conducted pursuant to a valid judicial order, the basis for differentiating between a line-up identification and an in-court identification is blurred.

benefits and yet impose a very substantial societal cost. Respondent disputes our contention that that theory would have limited deterrent benefits. He argues (Br. 35-41) that the other disincentives to unlawful action that we showed would still exist under our view (*e.g.*, the possible loss of tangible or verbal evidence or pre-trial identifications obtained as a result of unlawful detentions) are not significant because if the police complied with the Fourth Amendment, they would have no prospect of securing such evidence anyway. In short, respondent contends that the police would have nothing to lose by making illegal detentions or arrests if the court declines to allow such actions to taint other evidence retroactively.

Respondent's argument seems to be predicated on the assumption that only unlawful means will be successful in solving crimes; it overlooks the fact that, in this and similar cases, the police often have viable and lawful alternative means of pursuing their investigation. In this case, for example, they could have refrained from taking respondent to the police station and attempted instead to obtain a photograph of him or other identification by investigations at his school.³ If they recognized that taking him to the police station would ultimately be held unlawful, the prospect of losing any pretrial identifications or other traditional fruits of the detention would provide a significant incentive to pursue other, lawful investigative approaches; this is so even if the police believe that any illegality in the detention would not inevitably foreclose prosecutive use of in-court identifications of the suspect.

³As we noted in our opening brief (pages 35-36), we do not contend that the police would inevitably have pursued those other investigatory means. But in this case and this class of cases, the fact that unlawful action is not the only viable means of obtaining desired evidence is significant to the assessment of the incremental benefits of suppression.

With respect to the policies of the exclusionary rule, respondent also largely ignores the very substantial societal costs that would be imposed by the court of appeals' theory of tainted fruits. These costs are discussed in our opening brief (pages 36-42), and we do not repeat the discussion here.

3. We also argued in our opening brief that traditional attenuation analysis—although not readily applicable in this context—would support the admission of Owens' testimony. We relied particularly on the contention that the violation was not flagrant and on the absence of any indication that the officers were acting in knowing and deliberate disregard of their legal obligations (Br. 45-55). Respondent repeatedly asserts, however, that the officers were acting in bad faith and without any colorable justification and that the court of appeals so found (Br. 7, 8, 9, 10, 13 n.8, 15, 41 n.29, 53-54, 59).

There is no basis for this claim. Respondent has not cited, and we have not found, any passage of the court's opinion which supports his view that the officers acted in bad faith. Although the court of appeals described the officers' actions as "flagrant" (Pet. App. 44a), its conclusion was based only on the fact that they detained respondent for the specific purpose of obtaining the evidence they in fact obtained, and not upon the courts view that the officers acted in deliberate or reckless disregard of what they believed to be their lawful authority.⁴ Indeed, the court of appeals expressly rejected

⁴Thus, respondent relies (Br. 54) upon the court's statement (Pet. App. 48a) that respondent was illegally detained for the purpose of obtaining identification evidence. That a specific purpose of respondent's detention was to obtain his photograph for exhibition to the robbery victims is simply not tantamount to concluding that such action was undertaken without any support or despite a belief that it was unlawful. Moreover, as we stated in our opening brief (Br. 53)

respondent's contention that the police arrested respondent in bad faith on the pretext that he was a truant in order to cover their intention to obtain evidence in connection with the robberies at the Washington Monument (see Pet. App. 44a-45a n.32).

More fundamentally, the evidence as summarized in our opening brief (pages 51-42) clearly establishes that the police had a substantial basis for suspecting that respondent was the assailant sought in connection with the robberies at the Washington Monument. Furthermore, the officers' limited detention of respondent for the purposes of obtaining his photograph to show to the robbery victims and of determining his truancy status does not support an inference that they acted in willful disregard of what they believed to be proper procedures pursuant to their lawful authority. Respondent states (Br. 44 n.35, 55) that it is appropriate to apply the exclusionary rule "less rigorously" when the detention is undertaken in good faith. See also *Michigan v. Tucker*, 417 U.S. 433, 447 (1974). We agree. This is precisely such a case.

"[s]ince most Fourth Amendment violations are prompted by an investigative purpose* * * a consideration only of purpose will have the effect of [inappropriately] eliminating this factor from the attenuation analysis in nearly all cases."

CONCLUSION

For the foregoing reasons, and those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1979

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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-777

UNITED STATES OF AMERICA,*Petitioner,*

vs.

KEITH CREWS,*Respondent.*

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS.

**BRIEF OF AMERICANS FOR EFFECTIVE LAW
ENFORCEMENT, INC., AS AMICUS CURIAE IN SUPPORT
OF THE PETITIONER.**

FRANK G. CARRINGTON, JR., ESQ.,
WAYNE W. SCHMIDT, ESQ.,
Americans for Effective Law
Enforcement, Inc.,

Suite 960,
State National Bank Plaza,
1603 Orrington Avenue,
Evanston, Illinois 60201,

Counsel for Amicus Curiae.

Of Counsel:

FRED E. INBAU, ESQ.,
Americans for Effective Law
Enforcement, Inc.,

JAMES P. MANAK, ESQ.,
National District Attorneys
Association, Inc.,
666 North Lake Shore Drive,
Suite 1432,
Chicago, Illinois 60611.

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OF THE PETITIONER.**

This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file has been granted by the Solicitor General of the United States, counsel for the Petitioner, and by Mr. W. Gary Kohlman, Esq., counsel for the Respondent. Letters of consent of both parties have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE.

I. General Interest of the Amicus Curiae.

American for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under

the laws of the State of Illinois. As stated in its by-laws the purposes of the AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and police effectiveness to deal with crime.

II. Specific Interest of the Amicus Curiae.

Our particular interest in this case arises from the fundamental and far-reaching policy issue involved—the articulation and protection of the legitimate interests and rights of the victims of crime in a Free Society.

It is our belief that the result reached by the court below totally fails to balance those interests against the rights of criminal defendants and that it has constructed a rule of law that is simply too high a price to pay in a Free Society for the minimal and incidental benefits of deterrence of unlawful police conduct derived from the application of the Fourth Amendment Exclusionary Rule—benefits that are speculative at best.

We believe that this case affords the Supreme Court of the United States an opportunity to provide a Free Society with the cornerstone in a Bill of Rights for the Victims of Crime—the right to testify in open court against their accused attackers; and the right to avail themselves of the criminal justice system

to redress wrongs done to them and the People of their State by criminal defendants.

In addition, we believe that the Fruit of the Poisonous Tree Doctrine does not apply to this case as a matter of law.

ARGUMENT.

I.

Introduction.

The respondent was seen by two District of Columbia Park Police officers near the Washington Monument a few days after a number of separate robberies in a restroom on the grounds of the Monument. He was stopped by these officers and asked his name and age, as well as why he was not in school, since it appeared that he was of high school age. He was also told that he fit the descriptions given by the robbery victims. Respondent was then permitted to go on his way. A tour guide then told the officers he thought he had seen the respondent in the area on the day of the first victim's attack.

At this, the officers stopped respondent a second time and called a District of Columbia police detective in charge of the robbery investigation. The detective arrived only a few minutes later and attempted to photograph respondent, but was unable to do so because of poor weather conditions.

The detective then took the respondent to Park Police Headquarters where he was photographed, interviewed and released. The next day the first victim identified the respondent's photograph from an array of eight pictures and later identified respondent in a police lineup.

The trial court suppressed the testimony of the victims pertaining to the photographic and lineup identifications, but allowed in-court identifications on the basis that they were not affected by the police conduct and were derived from seeing the respondent commit the crimes.

On appeal, the majority of a District of Columbia Court of Appeals panel held that the in-court identifications by the victims were not the result of exploiting the primary illegality of the arrest and that the Poisonous Tree Doctrine of *Silverthorne Lumber Co. v. U. S.*, 251 U. S. 385 (1920) and *Wong Sun v. U. S.*, 371 U. S. 471 (1963) does not apply. The Court concluded that "[o]n the facts of this case, such a price [application of the Doctrine] would be too high." It carefully examined the conduct of the police and made it clear that it did not present, "the sort of egregious misconduct the deterrence of which would warrant the extreme sanction of barring the in-court identification testimony of the victims."

A majority of the *en banc* District of Columbia Court of Appeals, however, reversed, rejecting application of the independent source and inevitable discovery exceptions of the Poisonous Tree Doctrine and ruling that the victims' in-court identifications should have been suppressed as the fruit of an unlawful arrest.

Thus, the *en banc* court has set the stage for what *amicus curiae* submits presents a fundamental conflict between the rights and interests of victims, and the rights of defendants, as set forth in the Specific Interest of Amicus Curiae, *supra*, and presents the Supreme Court of the United States with an appropriate vehicle for articulating and balancing the competing interests and rights involved.

II.

The Fruit of the Poisonous Tree Doctrine Does Not Apply to the Facts of This Case in View of the Lawfulness of the Detention and the Independent Source of the Identification.

As is our custom when appearing as *amicus curiae* before this Court, we will not reiterate at any length the legal arguments made by the Government in this case, although we are in complete accord with such arguments and wish to associate

ourselves with and express our complete support for them. We will, rather, address ourselves to the important policy issues raised by this case, and to the importance of such issues to the effectiveness of law enforcement, nationwide. That effectiveness is absolutely dependent upon the cooperation of the victims of crime, particularly as witnesses in court, without which law enforcement in a Free Society can not function.

Amicus, however, can not overlook certain legal issues that are as vital to law enforcement as the central policy issues themselves.

The first such issue is the legality of the respondent's initial detention and subsequent arrest. The initial stop and brief detention were based upon the fact that the respondent appeared to be a school truant and matched the description of the robber given by the robbery victims. *Amicus* submits that such detention was fully warranted as a proper police investigatory tool under the rule of *Terry v. Ohio*, 392 U. S. 1 (1968) and its derivatives in the state and federal courts. With the information then supplied by the tour guide to the effect that he believed the respondent was in the area on the day of the first victim's robbery, it is submitted that the sum total of the information possessed by the police officers rose to the level of probable cause to arrest.

The police were aware of (a) the facts of the crimes, (b) the descriptions of the person who had committed them, (c) the fact that respondent matched the descriptions, (d) the fact that respondent was plausibly placed at the scene of at least one of the robberies by a disinterested witness (the tour guide), and (e) the identities of the complaining witnesses—all before the second detention at the stationhouse where respondent's picture was taken. That second detention was rendered necessary by the completely fortuitous fact that weather conditions did not permit photographing of the respondent at the scene of the initial, lawful detention.

It is submitted that the stationhouse detention was based upon a valid arrest and that the evidence obtained thereby did not violate Fourth Amendment principles.

Even if it is concluded that the in-court identification of the respondent by the three witnesses was causally related to an unlawful arrest, it is submitted that the panel opinion of the court below was correct in finding an adequate independent source for the identification testimony. As that court noted, while the trial court had concluded that the officers lacked probable cause to detain respondent, their suspicions concerning his involvement in the robberies and as a truant were well founded and he was released soon after he had been photographed and it was determined that he was not a truant. His stationhouse detention was minimal—approximately one hour—and the identity of the victims was known. The illegality of the arrest would never have prevented the respondent's prosecution (*Frisbie v. Collins*, 342 U. S. 519 (1952) and *Ker v. Illinois*, 119 U. S. 436 (1886)), and there exist an infinite number of ways that this respondent could ultimately—and legally—have been confronted by his victims.

Rejection by the *en banc* court of the independent source and inevitable discovery exceptions to the Fruit of the Poisonous Tree Doctrine was totally unwarranted on the facts of this case and the precedent set here will render these ameliorative rules practically unavailable to the state and federal courts in most factual settings.

III.

The Suppression of the Voluntary Testimony of a Victim of a Crime Is Too High a Price to Pay for the Minimal and Incidental Benefits of Deterrence of Unlawful Police Conduct Derived from Application of the Fourth Amendment Exclusionary Rule.

This Court has in the past taken great pains to emphasize that the judicially constructed Fourth Amendment Exclusionary Rule is not aimed at redressing harms done to individuals as a result of constitutional errors of the police, but at deterring such errors for the protection of society as a whole. *Stone v. Powell*, 428

U. S. 465 (1977). Thus, the Court has in recent years examined each case individually in order to balance the probability of deterrence against the price paid by society and the victim by the penalty of exclusion. This Court, only last year, has made it clear that in some cases the price of exclusion is simply too high to pay.

In *United States v. Ceccolini*, 98 U. S. 1062 (1978) this Court ruled that the cost of permanently silencing a witness because of an illegal search was too great for an "even-handed system of law enforcement to bear in order to secure . . . a speculative and very likely negligible deterrent effect."

The instant case presents an even stronger reason to reject application of the Poisonous Tree Doctrine than was presented in *Ceccolini*, for *Ceccolini* involved the testimony of a mere disinterested witness, while this case presents the compelling desire of the *victim of a crime* to testify against her assailant.

If the innocent victim of a crime, whose independent ability to identify her assailant is undeniable, is to be deprived of her day in court simply because a police officer committed an error which the victim had nothing to do with and which did not lead to the discovery or seizure of any evidence admitted at the defendant's trial, this Court will have returned such persons to the world of "private remedies" that existed before the origins of our judicial system. The societal implications of such a ruling would cry out for questioning whether *any* interest of victims and society could *ever* hold sway against a mere judicially constructed rule of evidence such as the Poisonous Tree Doctrine.

IV.

The Result Reached by the Court Below Fails to Balance the Legitimate Interests and Rights of the Victims of Crime Against the Rights of Criminal Defendants.

In recent years our judicial system seems to have lost interest in the rights of victims and witnesses, perhaps because of its

pre-occupation with the task of moving the Bill of Rights into the Twentieth Century for criminal defendants. While this has been a salutary task to be sure, it was not one which called for pre-occupation to the total exclusion of other legitimate, competing interests. For, as this Court well-stated over 45 years ago in *Snyder v. Massachusetts*, 291 U. S. 97, 122 (1934):

[J]ustice, through due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

No less a civil libertarian than Herbert Brownell, former United States Attorney General, addressed this current imbalance in his Second Annual Benjamin N. Cardozo lecture on March 4, 1976, entitled "The Forgotten Victims of Crime," reprinted in *Forgotten Victims: An Advocate's Anthology*, published by the California District Attorneys Association in 1977. While noting that in other legal systems, particularly those in Western Europe, victims can request to participate in the prosecution of the crime or to intervene to litigate a civil claim as part of the criminal action, Brownell observed that the victim in the United States lacks standing in a criminal action and is reduced to the status of a mere witness by the form of the action, brought in the name of the State or People. Brownell praised programs intended to alleviate the problems of victims in the criminal justice process, as worthwhile steps to restore the balance heralded by this Court in *Snyder*:

Such a balance is vital to society as a whole. It is essential to the maintenance of public trust in the integrity and effectiveness of the judicial process. Its erosion is cause for great concern, because community cooperation and involvement are indispensable if the courts are to play their part in maintaining the social order. In a government of laws and a society of consent, such as our own, citizens have a fundamental responsibility to participate in the judicial process as jurors and witnesses. A system of laws that guarantees individual liberty and safety depends upon the support of citizens. It is, however, unrealistic to demand such support without offering reciprocal benefits. The courts

have laid down rules to protect the person accused of crime, in the well-known *Miranda* case. What we need, for reasons I shall demonstrate shortly, is an informal *Miranda*-like program of actions designed to protect the crime victim in his role as complaining witness. Brownell, "The Forgotten Victims of Crime," *Forgotten Victims: An Advocate's Anthology* 8 (1977).

Others, too, have noted this imbalance, including the Federal Government which in recent years has funded the Commission on Victim Witness Assistance of the National District Attorneys Association (Grant 77 DF 99-0035, U. S. Department of Justice, Law Enforcement Assistance Administration) for the express purpose of providing solutions to the most cumbersome problems encountered daily by victims and witnesses involved in our judicial system: long delays, continuances, property return, transportation, restitution, to name a few. In its manifesto to that undertaking the National District Attorneys Association declared:

Since its inception, the Commission on Victim Witness Assistance field units have strived to accommodate and facilitate the needs of those forgotten persons in our criminal justice system—the victims and witnesses . . .

It has been the intention of the National District Attorneys Association to treat victims and witnesses as humans with personal feelings and not a piece of evidence to be used and later discarded. We hope that through the services our units have and continue to provide and those we have outlined in our publications, that your program will attain the goals and objectives you have set forth. Preface, *The Victim Advocate*, National District Attorneys Association (1978).

Amicus curiae notes this trend and return to a concern for the rights of victims with approval and submits that rejection by this Court of the tortured application of the Exclusionary Rule by the *en banc* decision below will enhance the restoration of the balance heralded by *Snyder*. Our request is not to ignore the Fourth Amendment rights of defendants. But, within the confines of the Exclusionary Rule and its sub-doctrines, and keeping in mind

that the Rule was judicially constructed to ultimately serve society's interest in deterrence of police misconduct, not to redress wrongs done to defendants, we feel there is adequate room to strike the balance.

Silencing the victims of crime and preventing them from gaining access to the courts and the criminal justice process will further delay the restoration of that balance. In striking that balance in this case the Court will put our priorities in a rational order.

A shift in priorities is long overdue. There must be a greater concern for the victims of crime. Furthermore, this can be done without disregarding those rights of suspected or accused persons that are designed as safeguards for the protection of the innocent; there need not be callousness toward all offenders. Some, especially the youthful first offenders, may well be deserving of compassion, rather than confinement in penal institutions. Nowhere in the delineation process, however, should we overlook the essential duty to protect potential victims. California District Attorneys Association, "Victim Rights Litigation," *Forgotten Victims: An Advocate's Anthology* 131 (1977).

CONCLUSION.

The efforts of law enforcement officers nationwide to deal with the problems of crime and lawlessness depend upon the cooperation of willing victims and witnesses to avail themselves of the criminal justice process in reporting crimes and testifying in court. The time has arrived to recognize the legitimate interests and rights of victims and witnesses. The suppression of the voluntary testimony of such persons, with all of its ramifications and implications, is indeed too high a price to pay for the continued application of the Fourth Amendment Exclusionary Rule.

Respectfully submitted,

FRANK G. CARRINGTON, JR., ESQ.,
WAYNE W. SCHMIDT, ESQ.,
Americans for Effective Law
Enforcement, Inc.,
Suite 960,
State National Bank Plaza,
1603 Orrington Avenue,
Evanston, Illinois 60201,
Counsel for Amicus Curiae.

Of Counsel:

FRED E. INBAU, ESQ.,
Americans for Effective Law
Enforcement, Inc.,

JAMES P. MANAK, ESQ.,
National District Attorneys
Association, Inc.,
666 North Lake Shore Drive,
Suite 1432,
Chicago, Illinois 60611.